Southwest Distributing Company, Inc. *and* Brewery, Soft Drink, Industrial & Allied Workers, a/w International Brotherhood of Teamsters, AFL–CIO,[1] Local Union 1111 *and* Rodney I. Lyons *and* Richard D. Jackson. Cases 23–CA–9824–1, 23–CA–9824–2, 23–CA–9824–3, 23–CA–9835, 23–CA–9835–2, 23–CA–10115–1, and 23–CA–10115–2

February 27, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On August 11, 1986, Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel filed limited exceptions and a supporting brief, the Respondent filed exceptions and a supporting brief, the Charging Parties filed limited exceptions and a supporting brief, the Respondent filed an answering brief to the General Counsel's exceptions and another to the Charging Parties' exceptions, and the Charging Parties filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, to modify the remedy,[3] and to adopt the recommended Order as modified.

The Respondent argues that certain 8(a)(1) and (3) allegations considered by the judge are barred by Section 10(b) of the Act. On September 25, 1985, the General Counsel issued a fourth amended consolidated complaint (the complaint) in this proceeding which alleged for the first time that the Respondent violated Section 8(a)(1) of the Act during June through September 1984, as follows:

> *Paragraph 10*: Soliciting an employee to file a decertification petition and rewarding him with a promotion for doing so.
>
> *Paragraph 12*: Causing the initiation and circulation of Union dues check off revocations, and encouraging employees to execute such revocations; and also providing job assistance to an employee to give him more time to solicit signatures on the decertification petition during working time.
>
> *Paragraph 13*: Telling an employee that help was needed in demonstrating to the Respondent's owner that there were black employees getting out of the Union.
>
> *Paragraph 14*: Telling an employee that the time was approaching when the decertification petition would have to be filed, and directing that employee to the employee who was in possession of the petition at that time.
>
> *Paragraph 15*: Interrogating an employee about his failure to abandon his Union membership.
>
> *Paragraph 16*: Soliciting an employee to sign a dues check off revocation, and promising him unspecified benefits if he did so.
>
> *Paragraph 17*: Promising an employee that he would receive an improved route if the Union lost the decertification election.
>
> *Paragraph 18*: Interrogating employees about how they had voted in the decertification election.

None of the above allegations was contained in unfair labor practice charges or previous complaints.

The judge dismissed the allegations in paragraphs 10 and 12 but found that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 13 through 18. We affirm the judge's substantive resolution of these allegations, except as noted in footnote 1 above.

The September 25, 1985 complaint also alleged in paragraph 26 for the first time that, inter alia, employees J. Holliday, Hartman, and Strange had been discharged in violation of Section 8(a)(3) and (1) in late October and November 1984. These discharges were the subject of separate unfair labor practice charges in

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resoultions unless the clear preponderance of all the relevant evidence convinces us they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In finding that the Respondent violated Sec. 8(a)(1) when Supervisor Gay made a comment to employee Johle to the effect that Johle would get a better route if the Union lost the election, the judge found that Supervisor Gay had not addressed this conversation in his testimony. The record shows that Gay did testify about this matter. We find it unnecessary, however, to pass on whether Gay's testimony constituted a denial warranting dismissal of this allegation as this 8(a)(1) finding would be cumulative and would not affect the remedy.

The General Counsel alleged that the Respondent violated Sec. 8(a)(1) by Supervisor Horner's telling employee Tharp that Tharp had been ''set up'' because of his pursuit of a grievance. Horner denied making the statement and testified that it was Tharp who remarked that he had been set up and that Horner had made no reply. Crediting Horner, the judge dismissed the 8(a)(1) allegations. In assessing the evidence concerning the alleged discriminatory discharge of Tharp, however, the judge drew an adverse inference from Horner's failure to reply to Tharp's assertion at the time, and considered his silence to be an admission that Tharp had, in fact, been set up. We do not adopt the judge's finding that Horner's silence constituted an admission that Tharp had been set up. In affirming the judge's recommended dismissal of this 8(a)(1) allegation, we rely only on his finding that Supervisor Horner did not make the allegedly unlawful statement in question. We do not rely on the judge's rationale set forth in his fn. 122.

In affirming the judge's finding that the Respondent's vice president Hayes unlawfully solicited employee Lyons to sign a decertification petition and a letter of resignation from the Union, we do not rely on the subjective evidence contained in Lyons' testimony about his personal reasons for signing those documents.

[3] Interest will be computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

late 1984 and early 1985, but the charges themselves were withdrawn or dismissed and were not reinstated.

The judge dismissed the allegation that Hartman was unlawfully discharged but found that J. Holliday and Strange were discharged in violation of Section 8(a)(3) and (1), as alleged. We affirm the judge's substantive resolution of these allegations.

As a procedural matter, the Respondent argued to the judge and contends before us on exceptions that the above allegations in paragraphs 10 and 12 through 18, and 26 regarding J. Holliday, Hartman, and Strange are time barred by Section 10(b) of the Act.[4] For the reasons discussed below, we affirm the judge's findings that these allegations were not time-barred by Section 10(b).

There were seven outstanding charges filed by the Union from September 4 through November 18, 1984. Each charge alleged one or more discharges in violation of Section 8(a)(3) of the Act. All the alleged discharges in these charges occurred from August through November 1984.[5] The theory of these charges as developed through the litigation of these cases was that the Respondent was ridding itself of the union supporters in the aftermath of its close victory in the decertification campaign. All the conduct described above which the Respondent alleges is time-barred occurred within 6 months of the timely filed charges. Thus, the issue we must address is whether these allegations are closely related to the allegations set forth in the timely filed charges.

Initially, we note that the withdrawal of J. Holliday's and Hartman's respective unfair labor practice charges, and the dismissal of Strange's charge by the Regional Director, do not preclude the subsequent inclusion of these allegations in the complaint if they are ''closely related'' to timely filed charges. Subsequent to the judge's issuance of his decision, the Board held in *Redd-I, Inc.*, 290 NLRB 1115 (1988), under similar procedural circumstances, that it would apply the ''closely related'' test to determine whether an amendment to the complaint is barred by Section 10(b), and that the closely related doctrine would be applicable regardless of whether an earlier charge encompassing the untimely complaint allegation was itself withdrawn or dismissed. Ibid. Thus, if the amendment is closely related to allegations in a timely charge it is not time-barred.

In *Redd-I*, the Board said that in applying the ''closely related'' test to determine the propriety of complaint amendments it would consider the following: (1) whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely filed charge; (2) whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely filed charge. The Board also indicated that it might consider whether a respondent would raise the same or similar defenses to both allegations. Ibid. The Board subsequently elaborated in *Nickles Bakery*, 296 NLRB 927 fn. 6 (1989), that it will not rely on a respondent's mere claims of different lawful reasons for taking different actions alleged in the complaint as unlawful, but will look to whether the timely and otherwise untimely allegations allege the same unlawful object.

Applying these principles to the instant situation, we find that the alleged discriminatory discharges of J. Holliday, Hartman, and Strange are sufficiently closely related to the alleged discriminatory discharges in the timely pending charges described above to permit the inclusion of these amendments to the complaint.

First, the discharges of J. Holliday, Hartman, and Strange are based on the same legal theory and the same section of the Act as those allegations of discharge in the timely filed charges. They were all part of the Respondent's alleged attempt to rid itself of union supporters in the aftermath of the Union's defeat in the July 1984 decertification election, in violation of Section 8(a)(3) and (1) of the Act. Second, the allegations pertaining to J. Holliday, Hartman, and Strange arise from the same factual situation or sequence of events as the allegations in the timely pending charges—the Respondent's discharges of union supporters during the 4-month period following the Union's defeat in the decertification election, for the alleged purpose of ridding itself of union supporters from its midst. Finally, although the Respondent has asserted a different reason for discharging J. Holliday, Hartman, and Strange (failure to report vehicular accidents) than it asserted as the reason for discharging the other employees in question during this time period (failure to remove stale beer), the judge found, at least with regard to J. Holliday and Strange as well as the discriminatees named in charges, that the Respondent's asserted reasons were pretextual and that the allegedly unlawful motive was the true reason for their discharge. See *Nickles Bakery*, supra at fn. 6; *Davis Electrical Constructors*, 291 NLRB 115 fn. 9 (1988). Under these circumstances, the allegations pertaining to the discharges of J. Holliday, Hartman, and Strange were sufficiently closely related to pending timely charges to permit their inclusion in the complaint, and

[4] Sec. 10(b) of the Act provides in pertinent part as follows: ''[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . .''

[5] The September 1984 charges in Cases 23–CA–9824–1, –2, –3, and –4 alleged the August 1984 unlawful discharges of employees Lofton, Rice, Tharp, and Riley, respectively. The September 1984 charges in Cases 23–CA–9835 and 23–CA–9835–2 alleged the September 1984 unlawful discharges of employees Kimbrough and F. Holliday, respectively. The November 1984 charge in Case 23–CA–9885 alleged the November 1984 unlawful discharges of employees Spina and Montgomery. Cases 23–CA–9824–4 and 23–CA–9885 were ultimately severed from this proceeding. Case 23–CA–9835 was also for a time severed from this proceeding, but was subsequently rejoined.

Section 10(b) of the Act therefore did not bar those allegations.

The Respondent also asserts that the June–September 1984 violations of Section 8(a)(1) contained in paragraphs 10 and 12 through 18 of the September 25, 1985 complaint, as summarized above, are time-barred by Section 10(b).[6]

At the outset, we do not rely on the preprinted ''By the above and other acts'' language on the Board's standard unfair labor practice charge form. In Nickles Bakery, supra, issued after the judge's decision, the Board discontinued its reliance on this preprinted language as procedurally sufficient support for particularized 8(a)(1) complaint allegations where there has been no showing of factual relatedness between the complaint allegation in question and the particularized allegations in the underlying unfair labor practice charge. In *Nickles*, the Board stated that it would apply the ''closely related'' test set forth in *Redd-I*, supra, to 8(a)(1) allegations.

Applying the *Redd-I* ''closely related'' analysis, we find that the 8(a)(1) allegations in complaint paragraphs 10 and 12 through 18 were closely related to the pending timely charges to permit their inclusion in the complaint, and that Section 10(b) of the Act therefore did not bar those allegations.

First, the 8(a)(3) discharge allegations in the timely filed charges involve the same legal theory as the otherwise untimely 8(a)(1) allegations in question. Thus, the alleged unlawful activity was assertedly part of the Respondent's overall plan of aggressively undermining employee support for the Union, encouraging support for the decertification movement, ridding itself of the Union, and then cleaning house of employees who had supported the Union or who had not supported the decertification movement.[7]

Second, the 8(a)(1) allegations arise from the same factual situation and sequence of events occurring during the same time period as the 8(a)(3) discharge allegations.

Further, the alleged 8(a)(1) acts in question, which assert substantial union animus, are clearly closely related to the timely alleged 8(a)(3) discharges. Accordingly, we find under Redd-I that these 8(a)(1) allegations are not barred by Section 10(b) of the Act. *Beretta U.S.A. Corp.*, 298 NLRB 232 (1990).

[6] We note that none of the unfair labor practice charges in this proceeding alleges any independent violations of Sec. 8(a)(1); they allege only the 8(a)(3) and (1) discharges discussed above. In addition to complaint pars. 10 and 12 through 18 in question here, complaint pars. 8 and 19 through 25 also contain independent 8(a)(1) allegations, which are not procedurally challenged by the Respondent.

[7] The fact that the timely 8(a)(3) charge allegations and the otherwise untimely 8(a)(1) complaint allegations invoke different sections of the Act does not preclude a finding that they are based on essentially similar legal theories. *Nickles Bakery*, supra at fn. 5.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, Southwest Distributing Company, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(d).

''(d) Post at its Houston, Texas facility copies of the attached notice marked ''Appendix.''[203] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.''

Tamara J. Gant, Esq. and *Arthur Safos, Esq.*, for the General Counsel.

Robert S. Bambace, Esq., R. Michael Moore, Esq., Carolyn Barefield Luedke, Esq. and *Steven R. Baker, Esq. (Fulbright & Jaworski)*, of Houston, Texas, for the Respondent.

Chris Dixie, Esq., of Houston, Texas, for the Union.

David B. Dickinson, Esq., of Houston, Texas, for Charging Parties Lyons and Jackson.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. Starting as a routine case involving eight dischargees, the principal issues here have expanded to include allegations that the Respondent unlawfully solicited and aided a successful effort to decertify the Union. The number of the alleged discriminatees has risen to 10.

The Government (the General Counsel) seeks an order (1) declaring the decertification case to be a nullity, (2) requiring Respondent either to execute or abide by a negotiated but unsigned contract, or on request recognize and bargain with the Union, (3) instructing Respondent to reimburse the Union for all membership dues it has failed to withhold and transmit, and (4) directing Respondent to offer reinstatement to 10 discharged employees and to make them whole.

''Do justice.'' So the sages and lawgivers have instructed us from ancient times, with the teachings for the Pharoah-to-be Merikare about 2100 B.C.[1] to the preamble of our American Constitution. Striving to attain that goal here, under the Act, I order Respondent to offer reinstatement to 8 of the 10 dischargees and to make them whole. I dismiss the other allegations, and deny the requested relief, because I find that the reach of the General Counsel's allegations exceeds the grasp of her proof.

This case was tried before me in Houston, Texas, over 17 days, beginning 5 November and concluding 5 December

[1] M. Lichtheim, 1 *Ancient Egyptian Literature* 97, 100 (1973; 1975 ed.).

1985, pursuant to the 25 September 1985 fourth amended consolidated complaint (complaint) issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 23 of the Board. The complaint is based on a series of charges, the first of which was filed 4 September 1984 by Brewery, Soft Drink, Industrial Allied Workers, a/w International Brotherhood of Teamsters, Local Union 1111 (Union or Local 1111) and served 5 September 1984, against Southwest Distributing Company, Inc. (Respondent or SDC).[2]

In her complaint the General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act by various interrogations and threats (express or implied) beginning 7 March 1984 and ending in June 1985, including soliciting an employee to file a decertification petition, assisting him to do so, and thereafter promoting him, and Section 8(a)(3) of the Act by discharging 10 named employees between 29 August 1984 and 3 July 1985.

By its answer Respondent admits certain factual matters but denies violating the Act.

In the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel,[3] the Union,[4] and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

A Texas corporation with an office in Houston, Texas, Respondent is a wholesale distributor in Houston of beer and related malt products for Anheuser-Busch, Incorporated (ABI). During the past 12 months, SDC purchased and received at its Houston facility goods and materials valued in excess of $50,000 directly from points located outside Texas.

Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that Teamsters Local 1111 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. Respondent's business and organization

As previously mentioned, SDC is the wholesale distributor for the beer and related malt products of ABI in Houston. To accomplish this distribution, SDC divides Houston into about 39 routes for the sales department. The delivery drivers are called route salesmen or driver/salesmen. Some of the routes have helpers assigned to assist the drivers.

Respondent's owner and chairman of the board of directors is Basil Georges. He sometimes uses, and is referred to, by the name of Bill, the Anglicized conversion of Basil. Since August 1982 James E. Craine has been president of SDC (1:146–147).[5] Craine came to SDC from ABI's St. Louis headquarters where he had worked for 20 years (16:2770–2771).

Jack Gray is Respondent's president emeritus, and he has worked at SDC for 25 years (17:2974). Bobby Hayes, who began over 14 years ago as a helper on a route and was a member of the Union, has been Respondent's executive vice president for about 2 years (16:2853).

Daniel D. Crouse is an important witness for the General Counsel in this case. Crouse began with SDC as an area supervisor in September 1980. In the spring of 1982 he was promoted to a brand manager. About late summer or early fall 1983 Crouse was promoted to vice president and sales manager (2:231, 233, 288, 359). On Monday, 13 August 1984, Crouse was promoted to be in charge of Respondent's Conroe, Texas branch as vice president and branch manager (2:233; 3:426). On Sunday, 4 August 1985, Crouse resigned at the request of President Craine (2:326; 3:537, 540). The only reason Craine would give Crouse was that owner Georges said ''Crouse does not fit into our future plans.'' (3:470, 538)

Preceding Crouse in the position of vice president and sales manager at Houston was Les Mattinson (1:134; 2:361). When Crouse left to head up the Conroe operation on 13 August 1984, Clayton Hunt, a sales supervisor, succeeded to Crouse's position in Houston (1:69–70).

The foregoing officials figure prominently in the case. Various supervisors, of course, also are involved. The area supervisors supervise up to three routes.

As we shall see, Respondent's lead counsel, Robert S. Bambace, is described by Crouse as playing a key role in Respondent's alleged effort to solicit and support an employee movement to decertify the Union. Bambace is not named in the complaint in any capacity.

The testimonial assertions of Crouse bear heavily on Respondent's overall motivation, and their impact is not limited to the allegations added in September to the trial complaint. Consequently, the credibility of Crouse is extremely important to the General Counsel's case.

A major portion of this case is devoted to what is called ''out of date'' or ''overage'' beer. Sometimes in the record it is referred to as stale beer. The subject is important because four employees[6] were fired for having overage beer on their routes. There is no dispute that Respondent's policy was that drivers were not to have overage beer on their routes. In practice there was flexibility, and discipline was always oral. The dispute centers on (1) whether Respondent used a new and more mandatory form of the rule as a pretext to discharge union supporters, and (2) whether there was any old beer at all on the routes of the dischargees, and if so, whether Respondent planted it there to provide the excuse to fire union supporters.

ABI has a strict rule requiring that its beer be ''rotated'' on retail shelves.[7] The rotation policy is designed to ensure the freshness of ABI's beer. To maintain the desired freshness, ABI requires that each can or bottle of beer re-

[2] All dates are for 1984 unless otherwise indicated.

[3] Counsel for the General Counsel attached to their brief a proposed order.

[4] The Union and Charging Parties Lyons and Jackson filed a joint brief signed by the Union's attorney.

[5] References to the 17-volume transcript of testimony are by volume and page.

[6] Raymond Lee Rice, Howard Lofton, Walter John Kimbrough, and Sammy Leon Tharp.

[7] ABI's seriousness on the subject is illustrated in the recent case of *Turner Beverage Co.*, 279 NLRB 160 (1986).

maining on a shelf in a retail store be removed no later than a specified number of days from the date the beer was bottled or canned. The allotted time is referred to as the shelf life.

The various beer brands have a different shelf life as follows (2:186–187, Craine; G.C. Exh. 47):[8]

75 *Days*	90 *Days*	105 *Days*
Michelob	LA[9]	Budweiser
Michelob Light		Busch
		Bud Light
		Busch Natural

At the brewery ABI stamps numbers on the bottoms of cans and scratches certain marks on beer bottle labels (U. Exhs. 24–26). The numbers stamped on the bottom of the cans, and the marks on the labels, are coded to indicate the date the beer was canned or bottled at the brewery (11:2138). ABI sells to its distributors a code booklet (G.C. Exh. 47). Using the book, which employs a Julian calendar system, a driver is able to ascertain whether a can of beer is approaching overage (2:186; 7:1264).[10] Drivers also have a small code card appropriate for carrying from which they can ascertain when a beer is about to go overage (G.C. Exh. 47).

Rotation of the beer basically means that the drivers do two things. First, as Crouse testified, they position the older beer to the front of the shelves and move the newer beer to the back or bottom (3:521). When customers take the closest can or bottle, they are selecting the older beer. In other words, the FIFO method is used—first in, first out.

Second, when beer reaches the point of becoming out of date, the driver stacks the beer aside off the shelf (so it will not be sold) and reports that fact to his supervisor.[11] There is a dispute concerning whether the report can be oral or must be written. At this point it suffices to know that a report is made to the supervisor.

The supervisor passes the overage beer reports to the sales manager who in turn sends a letter to the Texas Alcoholic Beverage Commission (TABC) requesting authority to remove the overage beer from the premises of the retail store (G.C. Exh. 37; 2:241; 7:1289). In due course the TABC returns the letter, but it now bears a signed authorization. Texas law makes it illegal to remove overage beer from a retail account without approval from the TABC (1:117; 2:184; 3:521).

As Craine and others testified, overage beer can be removed one other way—a driver or supervisor can simply buy it (7:1289). This is done only for small quantities, a couple of cans or a six-pack. Supervisors can be reimbursed on their expense accounts for these purchases, and some have been. It is unclear whether all request reimbursement. Craine testified that the preferred method for removal is through the TABC (7:1295). The apparent reason for this is that the removal cost is then at the wholesale level rather than at the approximately 25-percent higher retail price (16:2810). SDC, not ABI, absorbs the loss represented by the overage beer which must be removed and destroyed (3:520; 16:2804–2805).

In addition to the four drivers or helpers discharged for having overage beer on their routes, three drivers[12] were fired for failing to report accidents, and two employees[13] were discharged for failing to make required delivery stops. There is a dispute whether the 10th employee, Fred Holliday, was fired or quit.

2. Collective-bargaining history

The Union has represented Respondent's employees for many years. The most recent collective-bargaining agreement between Local 1111 and SDC was effective for the period of 1 June 1981 through 31 May 1984 (R. Exh. 37; U. Exh. 32; 1:43–44). In the spring of 1984 the Union and SDC engaged in negotiations for a renewal collective-bargaining agreement. The first of nine bargaining sessions occurred about mid-April, and the last one was held on 30 May (16:2774, 2779, 2903). At the hearing the parties stipulated that on 30 May 1984 Local 1111 and SDC concluded negotiating a renewal collective-bargaining agreement covering employees in the following appropriate unit (1:42–44):

> Included: All employees employed in the warehousing departments, and all employees employed as bottle route drivers, keg route drivers, hot shot drivers, coil cleaners, and helpers on trucks employed at its facility located at 1301 White Street, Houston, Texas, or at any warehouse facility located in Houston, Texas.
>
> Excluded: All supervisors as defined in the Act.

As we shall see, the renewal collective-bargaining agreement was ratified by the Union's members but never signed by the parties.[14] The General Counsel contends that the new collective-bargaining agreement was never signed because the Respondent did not want a contract with the Union and, acting from that motivation, initiated and sponsored an employee movement to decertify the Union through the efforts of employee Ross Miller.

On 15 June 1984 Ross M. Miller, in Case 23–RD–542, filed a petition to decertify the Union (G.C. Exh. 3; 5:848, 913, Miller). Conducted 30 July, the election was close with three challenged ballots being determinative. The parties agreed on a resolution of the challenges, and a revised tally issued on 7 August reflects that, of approximately 108 eligible voters, 52 ballots were cast for Local 1111 and 55 against (G.C. Exh. 7). The Union had lost.

On 13 August 1984 the Regional Director issued a certification of the results (G.C. Exh. 8). Some 2 weeks later, on 29 August, Respondent fired the first of the 10 dischargees named in the trial complaint.[15]

[8] Some witnesses recall different shelf life periods. For example, Supervisor Chris Garcia's description differs somewhat (14:2361).

[9] Although initially Craine inadvertently listed LA under both 90 and 105 days (2:186–187), he subsequently made clear that LA beer has a shelf life of 90 days (7:1275, 1279).

[10] The driver adds the number of shelf life days to the production date. If the total exceeds the Julian date of inspection, it is overage. Thus, a Budweiser (105-day shelf life) canned on 9 April 1984 (Julian day 100) and inspected by a driver on 24 July 1984 (Julian day 206) would be 1 day overage (G.C. Exh. 47).

[11] There is some evidence that the out-of-date beer stacked aside is to be tagged as old beer so that the store personnel will not sell it by mistake.

[12] John Holliday, Ira Strange, and Edward Hartman.

[13] Richard D. Jackson and Rodney I. Lyons.

[14] By its terms the negotiated collective-bargaining agreement was to be effective 1 June 1984 through 31 May 1988 (G.C. Exh. 18 at 25).

[15] Respondent fired three others: Louis Riley on 21 August, and Ronald Spina and Franklin Montgomery on 8 November. All three, along with five of the others, were named in the original complaint of 22 January 1985, but

3. Nature of the case

As the original complaint of 22 January 1985 reflects, this proceeding began (in the pleadings, at least) as a routine 8(a)(1) and (3) case.[16] Four complaints later we still have the basics of an 8(a)(1) and (3) case, but a few knotty problems have been added and now the General Counsel seeks a bargaining order. The fourth amended consolidated complaint, the trial complaint, has some 27 8(a)(1) allegations in 16 separate paragraphs beginning on 7 March 1984 and ending in June 1985. The sole 8(a)(3) allegation remains that of discharge, but now the list of discharges has increased to 10, with the first on 29 August 1984 and the last on 3 July 1985.

The dischargees and the dates of their terminations are (complaint par. 26; 1:46):

Raymond L. Rice	29 August 1984
Howard Lofton	30 August 1984
Sammy Leon Tharp	30 August 1984
Fred Holliday	10 September 1984
Walter J. Kimbrough	11 September 1984
John Holliday	28 October 1984[17]
Edward Hartman	21 November 1984
Ira Strange	28 November 1984
Rodney I. Lyons	3 July 1985
Richard D. Jackson	3 July 1985

In the (first) amended complaint of 5 April 1985, three names included in the original list of dischargees were deleted leaving a total of four. A fourth, Walter Kimbrough, was deleted along with them, but Kimbrough was returned to the listing of dischargees (bringing the total to five) in the second amended complaint which issued on 11 July 1985 (G.C. Exh. 1y).

The third amended consolidated complaint, which issued on 10 September 1985, added an additional 8(a)(1) paragraph (alleging two interrogation-type counts for April 1985) plus two employees (Charging Parties Lyons and Jackson) to the dischargees, bringing that list of names to seven. This third complaint scheduled the hearing for 2 weeks later on 24 September. However, the hearing was postponed because of a rather dramatic development.

The development occurred on 18 September 1985 when the Union's attorney brought Daniel D. Crouse to the office of NLRB Region 23 where Crouse gave the first of two affidavits (2:339–340, 354; 3:447). Crouse gave his second affidavit, a more detailed account, at his home 2 days later on 20 September 1985 (2:354; 3:447, 452). Based on the information Crouse provided,[18] the hearing was postponed and, thereafter, the fourth amended consolidated complaint issued on 25 September 1985.

4. The 10(b) issue

The trial complaint significantly expanded the allegations to be litigated. Added to the complaint were allegations that Respondent violated Section 8(a)(1) in June–July 1984 by causing employees to execute dues-checkoff revocations by encouraging and/or soliciting employee Ross Miller to file a petition to decertify the Union, and by providing Miller help with his regular work so that he could solicit signatures to support the decertification and Section 8(a)(3) by adding the names of John Holliday (fired 28 October 1984), Edward Hartman (fired 21 November 1984), and Ira Strange (fired 28 November 1984) to the list of dischargees, bringing that number to 10.

Respondent's position is that these new allegations (complaint pars. 10, 12–18 regarding Sec. 8(a)(1) and par. 26 as to dischargees John Holliday,[19] Hartman, and Strange) are barred by the 6-month limitation period set forth in Section 10(b) of the Act. Observing that none of the charges contain any 8(a)(1) allegation other than the generalized one preprinted on the Board's charge form,[20] and arguing that the new paragraphs are not related to the old, Respondent, at the beginning of the hearing, filed a motion to dismiss those allegations (R. Exh. 2, 1:28). I denied the motion (1:32).

The General Counsel contends that she properly amended the complaint to include paragraphs 10 and 12–18 because they are ''closely related'' to other allegations in the prior complaints (Br. at 129). Thus, in the original complaint the General Counsel attacks statements by Respondent's president and executive vice president in August 1984 in which such officials made statements discouraging interest in the Union inasmuch as the Union was no longer at the plant. These allegations postdate the decertification election of 30 July 1984 which the Union lost. The new allegations relate to Respondent's conduct in allegedly sponsoring employee Ross Miller to solicit employees to sign a petition in support of a decertification election. I agree with the General Counsel, and I reaffirm my ruling denying the motion to dismiss. *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959); *NLRB v. Dinion Coil Co.*, 201 F.2d 484 (2d Cir. 1952); *Red Food Store*, 252 NLRB 116 (1980).

Respondent also moved at the hearing to dismiss the names of John Holliday, Edward Hartman, and Ira Strange from paragraph 26 of the complaint on the basis that the charges naming them had been either withdrawn or dismissed and therefore, under the rule of *Ducane Heating Corp.*, 273 NLRB 1389 (1985), the 6-month limitation period of Section 10(b) of the Act barred the General Counsel from including them in the complaint (R. Exh. 1; 1:10).

John Holliday was fired 30 October 1984. On 29 January 1985 he filed a charge in Case 23–CA–9946 alleging that he was discharged because of his membership and/or activities in behalf of Teamsters Local 1111 (R. Exh. l, attachment E).

Riley, Spina, and Montgomery were deleted from the (first) amended complaint which issued 5 April 1985. They appealed to the General Counsel's Office of Appeals in Washington, D.C. By letter dated 11 July 1985 to Union Attorney Chris Dixie, the Region advised that after conducting an additional investigation it reaffirmed the decision to delete the three names (R. Exh. 65). Presumably the Office of Appeals agreed, for the three names were never restored to any of the succeeding complaints.

[16] The original complaint contains six paragraphs alleging independent violations of Sec. 8(a)(1), beginning on 7 March and ending 30 August 1984, and one paragraph listing eight employees as having been discharged in violation of Sec. 8(a)(3) between 21 August and 8 November 1984 (G.C. Exh. 1n).

[17] Although the alleged date for John Holliday is 28 October, a Sunday, I find that the actual date of discharge was 30 October 1984.

[18] No longer employed by Respondent at the occasion of his affidavits, Crouse was a former vice president at SDC. Hence, counsel for the General Counsel refers to his evidence as *inside information* (Br. at 132, 149).

[19] Distinguish John Holliday from Fred Holliday. The latter has consistently been listed among the alleged discriminatees.

[20] That preprinted allegation reads, ''By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.'' (G.C. Exhs. 1a, b, c, i, l, bb, and cc.) Compare *Clark Equipment Co.*, 278 NLRB 498 (1986); *Red Food Store*, 252 NLRB 116, 120 fn. 8 (1980).

Holliday withdrew his charge on 22 February 1985. The charge was never reinstated, and the General Counsel simply added John Holliday's name to the complaint, as she did the names of Hartman and Strange, based essentially on the evidence furnished by former Vice President Crouse in September 1985.

Edward Hartman was fired 21 November 1984, and 5 days later Attorney Chris Dixie, on Hartman's behalf, filed a charge in Case 23–CA–9885–2; he withdrew it on 26 December 1984.

After he was fired on 28 November 1984, Ira Strange, on 26 March 1985, filed his charge in Case 23–CA–9996. The Region dismissed Strange's charge on 6 May 1985. So far as the record reflects, Strange did not appeal the dismissal.

When the names of John Holliday, Hartman, and Strange were added to the complaint on 25 September 1985, no active charge was on file naming them, and the discharge of each had occurred well over 6 months earlier. On these facts the Respondent raised the defense of Section 10(b) and, citing *Ducane* and other cases, moved that I dismiss these three names from the complaint.

Under *Ducane* the limitations period of Section 10(b) is tolled if the General Counsel shows that respondent fraudulently concealed the ''operative'' facts relating to the action in question. In our case the parties, at the hearing and in the briefs, contest over whether the facts show such fraudulent concealment. At the hearing, and out of an abundance of caution, I ruled (1:26) that the General Counsel would have to proceed first in the limited area of adducing evidence showing a prima facie case of fraudulent concealment even though the General Counsel argued that she would rely on her entire case to show fraudulent concealment and that it would be difficult, if not impossible, to separate the evidence (1:23; 7:1301).

On the eighth day of the hearing the parties argued the issue. Because the mass of evidence from the parties on the point was too extensive, from a practical point, on which to hazard a bench ruling, I denied Respondent's motion to dismiss (8:1470).[21]

Although at the hearing and in the briefs the parties vigorously debate the fraudulent concealment issue, the General Counsel from the beginning has relied on the ''closely related'' theory as justifying adding the three names to the complaint where their charges had not, as in *Ducane*, been reinstated (1:13, 15–16; Br. at 127–132). As Member Dennis noted in *Ducane*, the ''closely related'' theory was not litigated or briefed there. *Ducane*, supra at 1391 fn. 9 (1985).

The General Counsel's argument is persuasive. Here the General Counsel simply added three names to a complaint which named others as having been discharged as part of a plan by the Respondent to discharge supporters of the Union. In view of the overall thrust of the allegations of the complaint, and as discharges already alleged to be unlawful span from August 1984 to July 1985, I find that the General Counsel acted within her statutory authority by adding the names of John Holliday, Hartman, and Strange who were terminated during the period spanned by the discharges of those already named in the complaint. *Fant Milling*; *Dinion Coil*; *Red Food Store*. Accordingly, I do not reach the fraudulent concealment issue.

B. *Some Crucial Credibility Resolutions*

1. President Craine flies to Europe

The sequence of events during the first 2 weeks of June 1984 is very important. The General Counsel and the Union contend that certain conversations occurred during that period involving Craine and Bambace. A significant point is that Craine contends he was on a vacation in Italy during most of that period. Resolution of the dispute on this may have far reaching consequences as to other determinations in the case.

When SDC submitted its final offer to the Union at the last bargaining session on 30 May, Business Manager Lynn Wells did not agree to it, but did say he would present it to the membership for ratification even though there would be one item of the collective-bargaining agreement difficult to sell (16:2781, 2905). It is undisputed that the next day, Thursday, 31 May, Local 1111 voted to ratify the collective-bargaining agreement. There also is no dispute that the parties never signed the negotiated document.

The General Counsel (Br. at 21, 65) and the Union (Br. at 3–4) argue that the contract was never signed because Respondent did not want a new contract and stalled the signing in order to initiate a decertification movement to get rid of the Union. Respondent denies any such motivation, and contends, in effect, that there really was no delay because the drafting and execution process usually requires several weeks.

Bearing on these respective contentions is a conversation which Lofton and Craine had at the start of the workday, about 7 a.m., on Friday, 1 June. Unlike other conversations, Craine (13:2306–2307) agrees essentially with Lofton's testimony (7:1307–1308) that on this occasion Lofton informed Craine that the membership had ratified the contract and that it appeared the Union would be there another 4 years. Craine, who already was aware of the ratification, replied that he was glad it was over, and that now they could proceed to prosper together into the future.

Relevant to this same subject is a letter owner Bill Georges, chairman of the board for Respondent, sent to employees on Wednesday, 6 June. A copy of one is in evidence as Respondent's Exhibit 5, and it reads:

[21] On the first day counsel for the Union expressed the view that it would be much easier to present the whole case in the usual order before attempting to decide the fraudulent concealment issue (1:21–22). Except where the evidence on the matter will be limited, it is clear that the normal order for presenting evidence is the better procedure.

June 6, 1984

Dear Mark,

I was pleased to learn of your support in the decision to accept the Company's contract proposal and of your presence for work on Friday morning, June 1. This decision of yours has offered us the opportunity to be more effective in a very competitive market. With our agreement in place, we now have the flexibility needed to go after the number one position in this area, which in turn will result in more volume of sales and additional earnings for you as well as the company.

It shouldn't surprise you to know that Southwest Distributing Company, Inc. has spent millions of dollars in capital improvements during the past several years and has committed many millions more in future expansions in warehouses, in the purchase of more trucks, forklifts, equipment, and including inventory, etc—all tools necessary to do the job.

Our projection for 1984 sales indicated about an 8% increase over 1983, then compounded to about a 12% increase in 1985. Barring the unforeseen, indications forecast that we should attain about 40% share of the market in a relative short period of time.

An open door policy has always existed in this company whereby your suggestions or gripes can be discussed with Jim Craine, Jack Gray, who although is on a limited work schedule because of his health is nevertheless available, or with me. Mr. Jim Craine, our new president and chief operating officer, will have completed two years this August. Those of you who have the opportunity to get to know him will realize his success in this business was based on hard work and dedication to not only his job but to the people with whom he works. I can guarantee you of his sincerity and sensitivity with regards to his employees. You ought to get to know him. He's like a lot of successful people who came up the hard way, and promise you he will treat you fairly and wants nothing better than the success of this company and the welfare of its employees.

It is my understanding that your decision to accept the company's proposal was based on mutual trust we have enjoyed over the years. I personally pledge to you that this trust will continue in our relations during the future, as it has in the past.

Best regards,

/s/B Georges
Bill Georges
Chairman of the Board

Respondent's contention that a delay of several weeks is not unusual in getting a collective-bargaining agreement typed and submitted for signing finds support in certain testimony of Wells. Wells concedes that Bambace represented the ABI and Miller beer distributors in Beaumont, Texas, on contract negotiations which concluded about 3 June 1985, yet it was not until late July that Wells received a copy of the draft from Bambace. Because of certain errors that had to be corrected by the Union, Wells delayed returning the documents until after Bambace wrote him a letter requesting that Wells expedite the matter. The contracts were not signed until October 1985 (10:1957–1960).

According to Wells, Bambace telephoned him during the week beginning Monday, 4 June 1984 and told Wells not to be impatient about the contract getting typed because he, Bambace, would be busy on something else, that Respondent had decided to change the commission arrangement whereby the drivers probably would earn more money than what had been agreed to, and that it was not his intention to leave Wells ''hanging out to dry.'' Wells understood the latter phrase to refer to the wage cut the Union had agreed to. Wells said he appreciated that position, but it was important to get the contract signed because many of the employees were ''bugging'' him about it (10:1942, 1957).

Wells subsequently testified that it was he who called Bambace, and that he made the call about midweek following the 31 May ratification vote, or about Wednesday, 6 June (10:1949). Still later he reverted to say that Bambace placed the call (10:1952–1953).

On numerous occasions beginning the week of Monday, 11 June, Wells testified, he unsuccessfully tried to reach Bambace by telephone, but the secretary said that Bambace was out of the city and unavailable, and Bambace never answered the messages Wells left (10:1943).

Wells later testified that he did not hear the secretary say that Bambace was out of town (10:1952), and that it was not until he had been calling a couple of weeks that the secretary informed Wells that Bambace was out of town (10:1951).[22]

Bambace admittedly accepted responsibility at the last meeting for having the renewal collective-bargaining agreement typed and transmitted to the parties (16:2905).[23] By letter of 8 June, Bambace sent a ''rough draft of the proposed contract'' to Gray for review by him, Hayes, and Craine (R. Exh. 66). The letter shows an enclosure (presumably a copy of the document) with a copy of the letter to Wells.

It seems clear that Bambace intended that a copy of the drafted contract go to Wells, for he testified that his regular practice was to send a copy and that Wells never called saying he did not receive the ''enclosure'' (16:2910, 2940). However, Bambace did not personally observe his then secretary packaging the letter (16:2908), and one of his co-counsel, in a letter dated 20 June to Region 23, acknowledged that a copy of the ''rough draft'' was not enclosed with Wells' copy of the letter (G.C. Exh. 53). Wells testified that he never received a copy of the drafted agreement (10:1946; 17:2994).[24] I find that although Bambace intended that a copy of the drafted contract be enclosed with Wells' copy of the 8 June letter, in fact the copy was not enclosed.

Wells testified that on receiving word that a decertification petition was being circulated at SDC with supervisory assistance and on working time, he telephoned Craine, reported the matter, and said he thought it was highly irregular that this was being done on company time (10:1943–1944). Craine said he was unaware of this and would check into it and call Wells back. To Wells' question on the status of get-

[22] Although I sustained an objection when offered for the truth of the conversation, driver and chief steward Howard Lofton testified that in early June Wells informed him that Bambace had to go to San Antonio to check on his father who had undergone heart bypass surgery (7:1308–1309).

[23] The parties stipulated that about 1 a.m. on 1 June a Federal mediator notified Bambace that Lynn Wells had called him and reported that the membership had ratified the collective-bargaining agreement (1:163–164).

[24] Even though Wells, as he testified, received his copy of Bambace's transmittal letter on 9 or 10 June, he concedes that, although no copy of the drafted document was enclosed, ''I didn't really do anything.'' (17:2994)

ting the contract typed, Craine said it was about ready but he needed to ask Bambace a couple of questions but the lawyer was unavailable. Craine never called Wells back (10:1943–1945). Wells places his conversation with Craine about Monday, 11 June, and testified he was ''absolutely'' certain that the earliest date would be Friday, 8 June and the latest being Wednesday, 13 June (10:1943, 1949, 1953, 1962–1963).[25]

Bambace testified that he left for San Antonio the late afternoon of 11 June, returned briefly to Houston on 15 June, went back to San Antonio the same day, and again returned to Houston the morning of 18 June where he remained the next 10 days before leaving again (16:2912, 2947). He denied the telephone conversation described by Wells, and testified that although his then secretary called him daily, she never reported any messages from Wells (16:2913, 2948, 2951).

As just noted, Craine testified that he left his office about midafternoon on Tuesday, 5 June 1984, preparatory to leaving on a trip to Rome, Italy (8:1441). His expense account for the first 2 weeks of June reflects that his actual departure from the Houston airport for Italy was the following day, 6 June (R. Exh. 24). Although Craine referred to the trip as a vacation (8:1441; 13:2307–2308), he apparently discussed some business at the Houston airport on 6 June, at the Rome airport on 13 June, and at Kennedy airport in New York City on 14 June (during the return) because certain expenses for dinner, drinks, and car expenses are claimed as reimbursable expenses (R. Exh. 24). Craine testified that he arrived back in Houston late that night on Thursday, 14 June. Because of ''jet lag'' he did not report to his office until about 10:30 a.m. on Friday, 15 June 1984 (8:1442).

No Respondent witness offered corroborating testimony concerning the dates of Craine's absence and vacation, and Respondent did not offer any supporting documents, such as copies of airline tickets, hotel receipts, or charge card receipts.

Lofton described a second meeting with Craine during the first 2 weeks of June. He testified that on Wednesday, 13 June, he, assistant stewards James Bailey and Raymond Rice, and Business Agent Dennis Byrd of the Union met with Craine and Executive Vice President Bobby Hayes in the latter's office to protest again the circulation of the decertification petition by Kirk Nelson during working time (7:1312, 1353). Lofton testified that, based on his notes, he was ''absolutely certain'' of the 13 June date (7:1356–1357).[26] Because it contends that Craine was in Europe during the timeframe in issue, Respondent describes Lofton's testimony as an ''outright fabrication.'' (Br. at 161.)

During their turns on the witness stand, neither Bailey, Rice, Craine, nor Hayes was asked about the meeting of 13 June. Byrd did not testify.

According to Lofton, on the afternoon of 13 June he observed Craine talking with Ross Miller near the truck shed when Miller was holding the decertification petition. The following day, 14 June, Lofton observed that Miller was soliciting signatures on the petition (7:1313–1318, 1358–1360). Craine did not address the afternoon conversation of 13 June during his testimony.

I find Wells' testimony unreliable as to dates and contents. By contrast, Bambace testified on this subject with specificity and persuasiveness. I therefore find that Wells did not converse with Bambace about 6 June or Craine (about 11 June) concerning the contract as he testified. Moreover, I do not credit Wells' testimony that he tried to contact Bambace numerous times during June. Wells was not anxious, I find, to get the contract signed, and his admitted inaction when his copy of Bambace's 8 June transmittal letter did not contain a copy of the ''enclosed'' draft reflects that unconcern. Indeed, he does not contend that he raised the subject of not getting his enclosure when he supposedly spoke with Craine about the contract only a couple of days later.

This is not to say that Wells did not have reason to be concerned, for he did. But he never testified that he was aware of the Board's rule that a contract not signed before the filing of a petition cannot serve as a bar to the petition even though the parties consider the contract properly concluded and implement some or all of its provisions. *Appalachian Shale Products Co.*, 121 NLRB 1160, 1161–1162 (1958).

This does not necessarily mean that Wells at no time had a conversation with Craine about employees circulating a decertification petition during working time. It is possible that both Lofton and Wells incorrectly placed the first observance as occurring on Thursday, 7 June, or Friday, 8 June. Conceivably that incident could have occurred on Monday, 4 June, or even the morning of 5 June before Craine left for Italy. Nevertheless, the Thursday, 31 May, ratification vote was an event so fixed in everyone's minds that they anchored other dates to it, either expressly or impliedly. When both Lofton and Wells, therefore, place the first decertification observation at a time at least a week after the ratification vote, I am disinclined to find that their dating was slightly off (not uncommon for all of us regarding dates in general) and that the actual sighting, and telephone call to Wells, occurred on 4 or 5 June.

There is no margin for error on the second meeting date of Lofton and Craine because Lofton is ''absolutely certain'' it was on 13 June and because he specifically describes seeing Ross Miller soliciting signatures the next day, 14 June. This, of course, had to be before the petition was filed, and therefore, before Craine returned from Europe.

Neither the General Counsel nor the Union addressed the matter of Craine's trip to Italy in their briefs, and neither offers any suggested resolutions of the contradictions in the evidence brought about by the existence and timing of

[25] Wells testified that employees informed him about 7 or 8 June that a decertification petition was being circulated and he tried to call Craine then but did not reach him until about 11 or 12 June (10:1943, 1951, 1962). Driver Howard Lofton, who was the Union's chief steward, testified that his first observance of anyone circulating the petition to decertify was about 7 or 8 June and he went that same morning and protested the matter to Craine who said he would have to confer with Attorney Bambace (7:1310–1312, 1348–1349, 1353). Lofton testified that he reported the matter to Business Agent Dennis Byrd, and that it was not until 15 June that he talked with Wells (7:1361–1362). Craine was not asked about the Lofton conversation but, as we shall see, he indirectly contradicts it by his testimony that he left for Rome, Italy, the afternoon of 5 June and returned to his office on 15 June (8:1441–1442). Craine denies having any conversation with Lynn Wells at any time after the ratification vote (13:2329–2330).

[26] An undated statement of 15 pages of handwritten notes (R. Exh. 32), prepared chiefly by Lofton but assisted by Rice, is in evidence for limited purposes (17:3107). Using his assortment of original notes (not in evidence) Lofton (and Rice) wrote out the 15-page statement in Attorney Dixie's office in late March 1985 (11:2033–2034). The sequence of dates set forth in the 15-page statement corresponds to the testimony of dates and events Lofton described at the hearing.

Craine's trip to Italy. It is clear that the parties could have introduced a great deal more evidence on this important subject, but, for whatever reason, they elected not to do so.

Craine's testimony about a trip to Italy is indirectly supported by one of the General Counsel's own exhibits. Thus, General Counsel's Exhibit 53 contains an assortment of letters. In one of the letters, dated (Tuesday) 12 June 1984, Gray writes to Bambace concerning certain discrepancies in the negotiated collective-bargaining agreement. The final paragraph of the letter reads:

> Of course I have not had the opportunity to have Jim Craine review this draft because of his trip to Europe, however upon his return to the Company on Thursday, I will do so.

Although I treat the package of letters as evidence only of correspondence between the parties, and not affirmatively for the truth of the matters asserted in the letters (except to the extent admissions are made by a party), Gray's letter is evidence that on 12 June he told Bambace that Craine was in Europe but would be back on Thursday, 14 June. It may be a fine distinction to write in one line that I do not consider the statement as independent proof, and in the next write in that I treat it as indirect corroboration of Craine's testimony. Even so, the distinction seems valid and I do view the fact that Gray made the statement—long before he could have known there would be a question on whether Craine went to Europe—as indirect corroboration of Craine's testimony.

Lofton appeared to be a sincere witness, but Craine's testimony was supported by an expense report plus Gray's letter to Bambace. As the General Counsel has the burden of persuasion, when the evidence leaves the scales at equilibrium, the General Counsel loses. Accordingly, I find that Craine did make the trip to Italy as he described. Because of Lofton's favorable impression as a witness, and because Craine never testified that there were no such meetings with Lofton, I shall not find that the meetings with Craine of 7 and 13 June 1984, described by Lofton, never occurred at anytime. I simply find that the General Counsel failed to show that they did occur and when.

We now have two objective factors to assist in deciding when, or if, certain other events or conversations occurred. First, everyone agrees that the ratification vote occurred on 31 May. Apparently the vote occurred late on 31 May, for, as the parties stipulated, it was after midnight (and into Friday, 1 June) when the Federal mediator notified Bambace. The ratification date is important because various witnesses were able to date other events in relation to the date of the ratification vote.

Second, we now know that Craine left his office at mid-afternoon on Tuesday, 5 June, thereafter vacationed in Italy, and did not return to his office until about 10:30 a.m. on Friday, 15 June—the very day Ross Miller filed the petition in Case 23–RD–542.

2. The testimony of former Vice President Crouse

a. *Craine's ''don't want a contract statement''; Bambace's purported ''different arena'' remark*

Former Vice President Crouse testified that he and Craine frequently discussed the progress of the bargaining negotiations for a renewal collective-bargaining agreement (2:275, 376). According to Crouse, at one point in May when he was in Craine's office, he asked Craine how the negotiations were progressing.[27] Bambace entered at that moment,[28] and Craine answered Crouse that it appeared the Union was going to agree to virtually everything SDC wanted (2:277). Crouse remarked, ''Well, at least we'll have a contract this time that we can live with.'' Responding to this, Craine said (2:278:

> Yes, but we really don't want a contract.[29]

Following Craine's statement, Bambace purportedly remarked (2:278, 414–415; 3:499):[30]

> Well, it's obvious we're going to have to move into another arena.

If there was any subsequent discussion on that occasion, Crouse did not describe it at the hearing.

Craine denied (1) saying that Respondent did not want a contract, (2) that the Union was agreeing to everything SDC proposed, (3) that Bambace said the Company did not want a contract, and (4) that Bambace said anything about moving into a different arena (16:2781, 2802–2803). Craine testified that it would be unusual for Crouse to be in Craine's office, that whenever they conversed the site normally was in Crouse's office, and that there was no meeting in Craine's office of Craine, Crouse, and Bambace (16:2814–2815).

Bambace also testified that Craine did not state that it appeared the Union was agreeing to everything, he denied making any statement about shifting to a new arena, denied that such a conversation occurred, and testified that whenever he spoke with Crouse it was in the sales office area (16:2913–2915). Bambace testified that he dealt with Georges, Gray, Craine, and Hayes, and not with Crouse (16:2916).[31]

There appears to be no dispute that the major portion of the renewal collective-bargaining agreement was negotiated at the final two bargaining sessions, 29–30 May. Lofton, a member of the Union's negotiating team (7:1302; 17:3014, 3098), agrees that during the last 2 weeks of May the Union did not agree to just anything, and that for the most part the

[27] Crouse was unsure of the precise date, and he vacillated in placing the date from mid-May to the last week in May, ending with the date of mid-May as specified in his second pretrial affidavit, given on 20 September 1985 (2:277, 413–416; R. Exh. 4).

[28] Crouse initially placed Bambace in the room before Crouse asked his question of Craine (2:277–278).

[29] As developed on cross-examination, in his second pretrial affidavit, given 20 September 1985, Crouse puts this portion first in Craine's answer, and places the part about the Union agreeing to everything at the close (2:413–414; 3:477). Also, Crouse acknowledged in his initial affidavit of 18 September 1985 he told the Board that either Craine or Bambace made the statement about the Union agreeing to everything (2:414). Crouse was still uncertain at the beginning of cross-examination on this topic, even saying he did not think it made any difference which one said it (2:412). That may be true substantively, but as an aid to resolving credibility, it does make a difference. Crouse concluded by attributing the statement to Craine (2:414).

[30] In his first pretrial affidavit Crouse reports that Bambace (not Craine) said that the Union was going to sign anything and, therefore, ''we're going to have to move into another arena.'' Crouse testified that his second affidavit correctly attributes the signing anything statement to Craine (3:477–478).

[31] Craine testified that during lunchbreaks in negotiations the executive group that met with Bambace consisted of Georges, Gray, Craine, and Hayes (16:2782).

parties were taking hard positions in lengthy discussions (17:3021–3022).

Craine testified that less than one-third of the collective-bargaining agreement had been agreed to before the meeting of 29 May, that the most productive sessions of all were the last two, with the last one, 30 May, being the most productive of all and it did not conclude until 11 p.m. or later (16:2780).[32] Lofton testified that by the end of the 29 May session about 75 percent of the contract had been agreed to, with six or seven major items still open, and economic issues were part of the open items (7:3012, 3031). Lofton did not estimate the percentage which had been agreed to before the 29 May session opened. I accept Craine's estimate of less than one-third, which I take as meaning about 30 percent.

On brief the General Counsel does not suggest which contract articles had been agreed to by the parties that could have prompted Craine to say it appeared the Union was going to agree to virtually everything SDC wanted. Absent evidence on that point, I am relegated to extrapolating from the other evidence that the only days Craine could have been prompted to make the statement would have been after either the 29 or 30 May sessions. Even then we do not know what was agreed to on 29 May, and we know also that six or seven major items, including economics, were unresolved at the start of the long session of 30 May. Moreover, Lofton testified that the bargaining during the last 2 weeks of May was long and hard. The best that can be said for the General Counsel's evidence is that Craine possibly could have made the statement on either 30 May, before the last session began, or on 31 May as SDC awaited the outcome of the Union's ratification process. Those 2 days seem to be the most likely ones which could qualify.

I have no real problem with Crouse's vacillating on the approximate date of the conversation with Craine and Bambace. Very few persons can recall dates accurately, and Crouse was handicapped by the fact he apparently did not record his memory in written form until he gave his two Board affidavits in September 1985—some 16 months after the event in question (2:388, 401). As we have seen, and shall see in more detail, there are several contradictions on important items between those two statements.

Crouse conceded that he was having a problem recalling dates, the sequence of events, and the actual words, but he asserted that his recollection was correct on the thought content (2:354, 403, 406; 3:481).

Assuming, for the moment, that Crouse's ''thought content'' is correct, then I find that the date of the conversation would have to have been either late 29 May, early 30 May, or sometime on 31 May, with the first two being the more likely possibilities since Craine's purported statement implies that the bargaining was not yet concluded. I therefore find that the conversation between Crouse, Craine, and Bambace occurred, if at all, about 30 May 1984.

[32] Although Lofton placed the closing time of the 30 May meeting at 7:30 p.m., he concedes that it was dark when they left (11:2072). At that time of the year, and with daylight savings time, it is very likely that ''dark'' means 9 p.m. or later.

b. *Gray's ''dummy up'' instruction; Craine's assertion that Ross Miller will lead a decertification movement; Bambace's ''orchestrated'' plan remark*

Crouse testified that beginning at ''the end of May'' or ''a day or two'' after the ''different arena'' discussion, and continuing until early August 1984, Respondent held a series of meetings of its managers with Crouse attending 8 or 10 of the meetings (2:279–280). The attendees would not be the same at each of these meetings, but, Crouse testified, the nucleus included Gray, Craine, Hayes, Crouse, Warehouse Manager Don Hollingsworth, Clayton Hunt,[33] and, at times, Jim Hammond, vice president and manager of draft operations. At the first meeting, a day or two after the ''arena'' discussion, this nucleus, including Hammond, was present (2:280–281).[34]

Crouse testified that the meeting was brief, and that it started with Gray instructing the attendees to ''dummy up'' and to avoid conversations with rank-and-file employees on union negotiations, whether they were union members, or whether they were eligible to vote for membership in the Union (2:281–282).[35] The meeting adjourned, but Crouse delayed leaving with the others. Attorney Bambace entered. With just Craine, Crouse, and Bambace present, *Craine* stated that Ross Miller would be leading a movement for decertification.[36] Crouse asked Bambace (not Craine), ''Well, what exactly is a decertification movement?'' Bambace replied that decertification is ''the legal way for the company to divest itself of the union.'' Why is Ross Miller going to do this, Crouse asked. Because, Bambace replied, this was ''an orchestrated plan for the company to rid itself of the union.'' To Crouse's inquiry of whether his law firm was going to represent Miller in this, Bambace answered, ''No. The Company and my law firm can't have anything to do with this. Another firm has been selected for him to go to.'' Inquired Crouse, ''What's in it for Ross?'' Craine stated, ''Don't worry about it. Ross Miller will be taken care of.'' At that point, Crouse testified, he left (2:282–283).[37]

On cross-examination Crouse admitted that in his first pretrial affidavit he reported that at one of the meetings ''one of the managers (I don't recall which) said that Ross Miller would be used to spearhead the decertification movement, and Craine said another law firm, other than Bambace's, would be used for Miller to go to for help,'' whereas in his

[33] At that time Hunt was simply one of the sales supervisors in charge of three routes and drivers (1:70, 135–136).

[34] Crouse subsequently confirmed that his second pretrial affidavit recorded this meeting as ''around mid-June.'' (2:398)

[35] Crouse subsequently testified that ''dummy up'' is not an exact quote, but rather is his interpretation of what Gray said (2:409).

[36] In one of many corrections made on cross-examination, Crouse testified that his reference here to Craine was erroneous and that in fact it was Bambace who said Ross Miller would be spearheading the decertification movement (2:398–399).

[37] On cross-examination during the second day of his testimony, Crouse conceded that in his first pretrial affidavit he recorded Gray as being present and as answering Crouse's question with the statement not to worry about it, that Miller would be taken care of (3:464). Crouse testified that on reconsidering the matter he now recalled that Gray was not present at that point, that his first affidavit was in error. and that the version in his second affidavit attributing the statement to Craine, was correct (3:464, 466, 474).

second affidavit Crouse attributed the statement about Ross Miller to Bambace (2:396–399, 403, 472–473).[38]

Crouse testified that he had little time to devote to the first affidavit because he had to leave for work at his new job, but he had the leisure of 4 hours for the second affidavit at his home (2:397–398). He testified that the version in the first affidavit was erroneous, and that the account set forth in the second affidavit (attributing the statement about Ross Miller to Bambace) is the correct one (2:397, 399, 403, 473). Nevertheless, he subsequently attributed the statement to Gray (2:409), only to correct that the following day at the hearing by testifying that Gray was not present when Craine made the statement (3:464, 466, 474).

Crouse also testified that he erroneously attributed, in his first affidavit, the other law firm statement to Craine, but that the correct version, as shown in his second affidavit, is that Bambace said it (2:473–475).

According to Crouse, after the meeting in which Gray instructed the managers to ''dummy up,'' and following Craine's and Bambace's subsequent remarks to Crouse in their private conversation, Respondent held a general meeting in the salesroom attended by all supervisors and, presumably, managers. Bambace repeated to the entire supervision, Crouse testified that Ross Miller and a couple of employees he trusted would be leading a decertification movement (2:408–409). Crouse placed these two meetings as occurring about the first of June (2:409).

At another point in his testimony Crouse asserted that at the second meeting for the managers, conducted about the first week in June, Craine told the attendees that Ross Miller and a couple of employees Miller trusted were gathering signatures for the decertification, and that the managers were not to have any group meetings with employees, and in any conversations with employees, do not promise or threaten, but to try and sway employees toward SDC's position before the voting. Craine told them there was no point in talking to the prounion employees such as Lofton, Rice, or Kimbrough because it would just alert them to be on watch (2:283–286).

We need to digress for a moment to discuss the matter of when attorney Bambace addressed Respondent's supervisors. There appears to be no dispute, and I find, that Bambace spoke to Respondent's supervisors on three occasions during the period of April–June 1984. The first of these meetings was held shortly before the first bargaining session in April. Attorney Bambace was introduced to the assembled supervisors by either Craine or Basil Georges (2:274–275, Crouse; 16:2774, Craine; 16:2917, Bambace). Before Bambace spoke, Georges said that Bambace and his law firm had been hired to assist in the forthcoming contract negotiations, and that everyone was to follow Bambace's instructions (2:275). Bambace told the supervisors that during the period of negotiations they likely would hear rumors, that they should refer any questions to Gray, Craine, or Hayes, and to delete ''union'' from their vocabulary (2:368; 16:2775, 2917). Bambace met with the supervisors a total of three times (16:2776, 2814, 2916).

The second time Bambace met with the assembled supervisors was about Friday, 18 May (16:2776, 2918). SDC had arranged for advertisements to run in the local newspapers announcing that Respondent would be interviewing for the positions of drivers, helpers, and warehousemen on Saturday, 19 May (16:2777). There is a dispute between Bambace (16:2918) and Lynn Wells, the Union's president and business manager (10:1936; 17:2993–2994), concerning whether Wells, at one of the negotiating sessions, expressed the threat of a strike and, therefore, whether the interviewing was in response to that threat.[39] I need not resolve that collateral dispute.

The third occasion when Bambace met with the assembled supervisors was about Tuesday, 19 June, following the 15 June filing by Ross Miller of the decertification petition in Case 23–RD–542 (16:2777, Crouse; 16:2918, Bambace). At this third meeting Bambace informed the supervisors about the petition, distributed copies of a set of ''Do's and Don'ts'' (R. Exh. 6), and instructed them in what they could and could not say or do through the use of the acronym TIPS, meaning no threats, interrogation, promises, or surveillance (2:369–374; 16:2777, 2918–2919).

Although Crouse testified that he did not recall a third meeting between Bambace and the supervisors, he confirmed the contents of the meeting (as described above) and does not argue with the date of 19 June (2:369–374).[40]

I return now to the summary of Crouse's testimony about statements he attributes to Gray, Craine, and Bambace in the period of late May to sometime in June. On cross-examination Crouse admitted that he could have confused his testimony about Ross Miller's spearheading a decertification movement with Bambace's statements to the supervisors on 19 June about Miller's filing the decertification, and Bambace's discussing the ''Do's and Don'ts.'' Nevertheless, Crouse testified, he did not think he was mistaken (2:399).

For their part Craine (16:2806–2807) and Bambace (16:2914–2915) vigorously deny that Craine made any statement that Ross Miller would lead a decertification movement and that Bambace made an ''orchestrated'' plan remark. As earlier noted, Craine testified there was never a conversation in his office between him, Crouse, and Bambace (16:2814–2815), and Bambace testified that the only place he met with Crouse was in the sales office (16:2914). Bambace asserts flatly that the conversation about Ross Miller circulating a decertification petition never occurred (16:2915).

Although Bambace did not specifically deny broadcasting to all the supervisors that Ross Miller would be leading a decertification movement, Craine (16:2775–2777) denied it as did Supervisor Robert Gay (14:2472). Whatever difficulty I have in making findings on other issues, I have no hesitancy at all in finding that Bambace did not announce to the assembled supervisors that Ross Miller would be leading a decertification movement. Actually, Crouse's testimony at that point followed so many other corrections of either his previous testimony or his first affidavit that it is possible (although not certain) that he momentarily became confused and mistakenly reported that Bambace did broadcast to all

[38] As earlier noted, Crouse gave his first affidavit, 4 pages, on 18 September 1985 and his 19-page second affidavit 2 days later (2:352– 353, 388; 3:447).

[39] Craine confirms Bambace's testimony that Wells did make a strike threat (16:2788).

[40] There is a reference in the record that the third meeting with the supervisors could have been as late as Friday, 22 June. That is the date Craine specifies in his pretrial affidavit of 24 October 1984 (G.C. Exh. 54 at 4). However, the date of 19 June is close enough.

supervision what, according to Crouse's earlier testimony, was a confidential report to a few managers.

c. *Possible animosity of Crouse toward owner Basil Georges*

As mentioned earlier, Crouse left SDC's employment on Sunday, 4 August 1985. On that day, Craine asked Crouse for his resignation (2:326; 3:536, 540). The ''request'' came as a complete surprise and shock to Crouse (3:537). When Crouse asked why, Craine stated that owner Basil Georges said that Crouse ''just doesn't fit into our future plans.'' (3:470, 538) Crouse was not given anything more specific than that.

Crouse admits that for a short time he was angry. He testified, however, that he does not dislike Georges, but that he was concerned about what Crouse viewed as Georges' (1) inconsistent and irrational business decisions, and (2) his unbridled lack of concern about the loyalty and happiness of his employees (3:470, 483–484). Because of his feeling that Georges acted unfairly in discharging him and others, Crouse concedes that anger over such unjustness was a factor motivating his decision to go to NLRB Region 23 in September 1985 and give evidence (3:485). Notwithstanding that concession, Crouse testified that the manner of his termination did not cause him to shade his testimony (3:540).

Crouse's decision to go to the Labor Board followed a call from Howard Lofton suggesting that he contact Chris Dixie, attorney for the Union. Actually, Lofton had called Crouse earlier to suggest this, twice before Crouse's termination and possibly once afterward before this call, but Crouse would never discuss the matter with him (3:470–471). Even though Crouse had rejected these previous suggestions by Lofton, Crouse had been doing much ''soul searching,'' ''agonizing,'' and examining his conscience for the past 10–12 months concerning the various discharges (3:470, 482, 510). To preserve his job, and to protect SDC, Crouse remained silent for fear that Georges, whom he considered as inconsistent and irrational, would retaliate (2:328, 332; 3:483, 512).

Finally, on 18 September 1985 Crouse went to see Attorney Dixie. After he and Dixie conferred about 5 minutes, Dixie took him to NLRB Region 23 where Crouse, as described earlier, gave the first of two affidavits (2:339–340, 354; 3:447–448).

Also to be considered in conjunction with Crouse's credibility is the Union's argument that Crouse testified under the strain of knowing that attorney Bambace represents Crouse's current employer (Br. at 60). On Monday, 16 September 1985 Crouse began work at Moore's Foods in Houston (2:342).

In late September 1985, after Crouse had begun work at Moore's and given his affidavits to NLRB Region 23, Crouse observed Attorney Bambace in the store where he worked conversing with Moore. Crouse went over and shook Bambace's hand. Crouse was informed by one of them that Bambace was retained counsel for Moore's Foods. A moment later Moore left and Crouse and Bambace continued to talk. Crouse informed Bambace of his termination, his visit to Region 23, and that he would testify concerning Bambace's ''different arena'' and ''orchestrated plan'' remarks and other matters (2:342–346; 3:493–494, 524–525). Crouse testified that Bambace denied saying these things (3:525–526). Bambace asked for a copy of Crouse's affidavit. Crouse agreed, but as Crouse had not yet been furnished a copy, Bambace had to come back to the store to get the copy in the week before Crouse testified (3:527–528).

Asserting Crouse was unable to tell the same story twice, and that the reason for his shifting positions was something other than honest confusion, Respondent argues that Crouse's testimony was ''utter fabrication.'' (Br. at 144.) Crouse made his ''preposterous'' (Br. at 144, 147, 150) claims, argues Respondent, because he was angry at owner Georges for firing him, and he twisted innocent events and fabricated others in order to achieve revenge against Georges (Br. at 148–149).[41]

Respondent even suggests a solution to the credibility riddle. It theorizes that ''Crouse, proceeding on the assumption that only Bambace was smart enough to start a decertification petition, jumped to the conclusion that Bambace must have been involved and proceeded from there to fabricate the events concerning which he testified.'' (Br. at 148–149.)

Respondent goes on, for example, to suggest that Bambace's acknowledged statement to the assembled supervisors that Ross Miller ''had filed'' a petition was converted by Crouse to the ''orchestration'' statement (Br. at 149). On this, and other examples, Respondent contends that Crouse ''continued to weave his fictitious tale that he was advised that another law firm would be representing Miller and that Miller 'would be taken care of.' In short, Crouse decided what must have happened in light of his low estimation of Company officials and, motivated by his anger at Georges, concocted a scenario, and a preposterous one at that, wherein the Company, led by Bambace, instituted the decertification effort.'' (Br. at 149–150.)

Ignoring the possibility of revenge as Crouse's motive, counsel for the General Counsel contends that ''Crouse had no reason whatsoever to testify to admissions against his interest or to relate anything but the complete truth.'' By contrast, they argue, Craine and Bambace have an ''extremely strong motive to deny the facts.'' (Br. at 62.)

d. *Crouse essentially credited*

Crouse testified with apparent sincerity even though he admittedly had a problem with dates, the sequence of events, and recalling who was doing the speaking. He stands by the accuracy of his recollection as to the contents of the conversations. For the most part, Crouse's ultimate reconstruction of the two most important conversations boils down to his attributing some comments to Craine and others to Bambace. At one point Crouse dismissed his confusion over whether it was Craine or Bambace speaking by saying he did not think it made any difference which one said it (2:412).

Bambace was persuasive in his denials of statements attributed to him, but Craine testified unpersuasively. Accordingly, to the extent I now describe, I credit Crouse.

I find that the statements Crouse described were in fact made—but by Craine, not by Craine and Bambace. Thus, I find that in a conversation between Craine and Crouse about Wednesday, 30 May 1984, in Craine's office, Craine made the remarks about the Union's agreeing to virtually everything, that Respondent really did not want a contract, and

[41] Elsewhere Respondent describes another portion of Crouse's testimony as the product of his ''vindictive imagination.'' (Br. at 178.)

that it was obvious SDC would have to move into another arena.

Some 2 days later, about Friday, 1 June, and again in Craine's office with just Craine and Crouse present, the conversation occurred as Crouse described except that Bambace was not present and Craine made the remarks Crouse attributes to Bambace as well as those Crouse attributes to Craine.

It was, I find, Craine who said that Ross Miller would be used to spearhead a decertification movement, Craine who explained what that was, Craine who described it as an ''orchestrated'' plan to get rid of the Union, and Craine who, in answer to Crouse's question whether Bambace's law firm would represent Miller, said that SDC and Bambace's firm could have nothing to do with it and that another firm had been selected to assist Miller. The conversation concluded, as Crouse testified, with Crouse asking ''What's in it for Ross?'' and Craine answering:

> Don't worry about it. Ross Miller will be taken care of.

C. *The Decertification Events*

1. The allegations

The trial complaint contains a series of paragraphs (10 and 12–16), some with subparagraphs, alleging that from early June through July 1984 Respondent encouraged, solicited, and assisted (1) employee Ross Miller to circulate and file a decertification petition, and (2) employees to resign from the Union and to revoke their dues-checkoff authorizations.

Complaint paragraph 10 alleges the solicitation by Craine of Ross Miller and the eventual promotion (as a reward) of Miller to supervisor. Paragraph 12(a) alleges both Craine initiated and encouraged the dues-checkoff revocations, and 12(b) alleges that Respondent assigned extra help to Ross Miller to give him free time to solicit signatures on the decertification petition. Paragraphs 13, 14, and 16 allege that in June Executive Vice President Hayes solicited an employee to sign both the decertification petition and the dues-checkoff revocation in order to demonstrate to owner Basil Georges that black employees were withdrawing from the Union. Paragraph 15 alleges that about mid-June Vice President Crouse interrogated an employee concerning his failure to abandon his union membership.

2. Preliminary facts

To understand the relationship of events we need to summarize the sequential facts concerning the decertification petition. The allegations in complaint paragraph 10 concerning this will be addressed later.

There is no dispute that beginning 1 June Respondent applied the terms of the negotiated but unsigned 1984–1988 collective-bargaining agreement (2:394, Crouse; 13:2331, Craine). These terms included some items less favorable to employees than those existing in the prior collective-bargaining agreement. For example, a more restrictive set of work rules was attached, and the Union agreed that seniority would no longer be the controlling factor in layoffs and on job bids. Ross Miller testified that under the wage concession granted by the Union, some employees could receive as much as $7000 to $8000 less in commissions each year, and they also would have to pay more for their insurance (5:902–904).[42]

Miller testified that the drivers became upset and considered that the ''union had sold us down the river.'' (5:858, 902–903) Driver James T. Bailey was a strong and open union supporter and a member of the Union's contract committee in 1984 (9:161–1653). Bailey testified that the union negotiators seemed upset at the end with SDC's proposals, and that the work rules were just part of the cause of their unhappiness (9:1655–1656).

The membership ratified the agreement, but the dissatisfaction of the employees surfaced in their circulating and signing the petition to decertify the Union. Although the complaint alleges, and the General Counsel argues, that Respondent encouraged and solicited Ross Miller to file a decertification petition, the undisputed evidence is that it was employee Kirk Nelson, not Ross Miller, who initiated the petition the employees signed. Ross Miller so testified, explaining that he became involved in early June shortly after Nelson initiated it (5:849, 858, 864, 878–882).

The petition already was worded when it came to him, Miller testified.[43] He told Nelson he wanted to get involved and get back the extra charge on the pension fund the Union was taking from the employees (5:864). The preamble to the petition reads (G.C. Exh. 2):

> WE THE UNDERSIGNED BELIEVING THAT LOCAL 1111 DOES NOT REPRESENT OUR BEST INTEREST PETITION FOR DECERTIFICATION OF TEAMSTER 1111 AS BARGAINING AGENT FOR SOUTHWEST DISTRIBUTING COMPANY'S DRIVERS, HELPERS, KEG DRIVERS, LINE CLEANERS AND WAREHOUSEMEN. THIS WAS VIVIDLY DEMONSTRATED BY THEIR HANDLING OF SOUTHWEST DISTRIBUTING'S PENSION PLAN

Under the preamble appear two columns of signatures numbered 1 to 45. On the second page the numbered signatures end at 50, but there are an additional 11 unnumbered signatures, for a total of 61, with the last one being R. Lyons. As Ross Miller testified, the first signature is that of Daryl Kirk Nelson, with Miller's being the fourth (5:865). Appearing in the upper right corner of the petition is the date ''6-15-84.'' There is no dispute that the petition was circulated before that date, and Miller testified that, as best he could recall, he wrote the date on the petition the day (15 June 1984) he filed it at the office of NLRB Region 23 in Case 23–RD–542 (5:865, 866).[44]

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[42] Lofton confirmed that the pay for the drivers was reduced following the ratification (7:1308).

[43] Nelson did not testify. Miller testified that so far as he knows Nelson is the one who wrote the preamble (5:867). The sales drivers, as Miller was at that time, are part of the package sales department. Miller testified that Nelson was classified as a coil line cleaner in the keg or draft department (5:919–920).

[44] References to the decertification petition can be confusing. The document bearing the preamble and the signatures of 61 employees is actually the evidence satisfying the Board's discretionary practice, set forth in Statements of Procedure, Sec. 101.18(a), that a petition for decertification filed under Secs. 102.60 and 102.61 of the Board's Rules and Regulations must be supported by a showing of at least 30 percent of the employees in the affected bargaining unit. The document which is the formal petition is on a form provided by the Agency, and that it is the document which is docketed here as Case 23–RD–542 (G.C. Exh. 3). To distinguish between the two documents, I shall

Continued

Chief Steward Howard Lofton testified that his first sighting of someone circulating the decertification petition was approximately Thursday, 7 June, when he observed Kirk Nelson soliciting employees to sign it about 7:15 or 7:20 a.m. When Lofton approached him, Nelson showed the petition to Lofton who informed Nelson that he was violating rules 35 and 44 of the ratified agreement.[45] They disputed the matter, and Lofton said he would protest the matter to Craine (7:1310–1311). Previously summarized is Lofton's testimony about protesting the matter to Craine a few minutes later (7:1311, 1348–1349). As I have found, on 7 June Craine had just arrived in Italy.

Lofton did not observe Ross Miller with the petition until the afternoon of 13 June, when he observed him with it as Miller and Craine conversed in the yard of the compound by the truck shed, and again the next morning, 14 June, when he was showing the petition to some other employees (7:1313–1315, 1354–1360). As his expense report reflects, on 13 June Craine departed Italy (R. Exh. 24).

Crouse testified that Executive Vice President Bobby Hayes instructed him to provide Ross Miller extra help on his route so he would have sufficient time to solicit the vote of employees, including those in the warehouse and draft departments (2:287). Crouse testified that this conversation was in mid to late June (2:287, 298).

Crouse testified that he had extra help dispatched to assist Miller during the first 2 weeks of July (2:298). During early June Crouse observed that Miller would remain at the compound until 9 or 9:30 in the morning, proceed in his private car to his route, and return about the earliest permitted check-in time of 3 p.m. On some of these occasions Crouse observed that Miller, who was carrying a manila folder, would talk with employees (2:286, 293; 3:496 497).[46]

Several drivers testified that at some point during the first 2 weeks of June Ross Miller and Kirk Nelson either solicited them to sign the petition or they observed them soliciting others. However, these witnesses place the time of such occasions as being at the compound before the drivers embarked on their routes or after they had returned. There is no testimony that Miller (or Nelson) solicited on the routes, or interrupted employees who were working at their jobs. Moreover, there is no testimony from any warehouse employee that Miller entered there and solicited signatures during the day while others supposedly delivered Miller's route for him.

As with other areas of his testimony, Crouse testified in an uncertain manner regarding dates and the sequence of events. It is possible that he merged two separate periods. One period was the first 2 weeks in June when Ross Miller and others (Kirk Nelson and Guy Wright) solicited signatures on the petition.[47] The second was the campaign period which followed Miller's filing of the RD petition. Conceivably, therefore, Vice President Hayes could have instructed Crouse to assign extra help in July to enable Ross Miller to solicit *votes* (the word Crouse used in his testimony) against the Union in the election scheduled for 30 July.[48]

I find the General Counsel's evidence on this subject to be unreliable.

3. The alleged assistance to Ross Miller; Gray gets a copy of the petition; promotion allegation dismissed

Crouse testified that at some point in the week of 28 May–1 June Supervisor Mel Cook asked whether Crouse had noticed that Ross Miller seemed to be meeting frequently with owner Georges in the latter's office. Crouse replied that he had not noticed it, but that he knew Ross Miller had been across the compound (in the building housing the offices, apparently) quite a bit although he did not know what he was doing there or where (whose office) he was going (2:278–279; 3:434–435).[49]

Cook denied having any such conversation with Crouse, and he testified that he never saw Ross Miller going to Georges' office or in Georges' office (15:2671–2672).

Ross Miller testified that he was not in owner Georges' office at anytime during May or the first 15 days of June and that he did not speak with Georges at any time during that timeframe (5:858–861). I credit Crouse. Ross Miller testified that on 15 June he went to President Emeritus Jack Gray, his friend of over 30 years, told him he had a list of employees who wanted to get out of the Union, and he asked if Gray could help him. Saying that he thought he could, Gray telephoned Bambace who in turn furnished some names and telephone numbers of agents at NLRB Region 23 to call. Miller called, made an appointment, went to Region 23, and filed the RD petition (5:848, 909–913).

Miller testified that he never mentioned the petition to Gray (presumably, that is, before 15 June),[50] that he never showed the petition to employees in the office, that he never showed it to anyone in management, nor did he ever tell anyone in the office or in management who had signed or not signed the petition (5:917–918). He testified that no one (in management) asked to see it (5:975).

Shortly after he filed the RD petition, Miller returned to Gray and said he might need an attorney because he did not

refer to the paper with the preamble and 61 signatures (G.C. Exh. 2) as the decertification petition, or just ''petition,'' and to the formal petition (G.C. Exh. 3) as the RD petition. Copies of the docketed RD petition are mailed to the interested parties, but copies of the showing of interest (the decertification petition) are not mailed since the showing of interest is a purely administrative matter. 2 *NLRB Casehandling Manual* Secs. 11008, 11010 (Apr. 1984). The showing of interest, confidential in the representation case, may become an exhibit, as here, in a subsequent unfair labor practice case.

[45] Rule 4 provides that employees shall not interfere with other employees on the job (G.C. Exh. 18 at 32). Rule 35 reads, ''Solicitation for any cause during working time without permission is prohibited.''

[46] Crouse testified that Supervisor John Roschal told him that Miller had ''information'' in the folder pertaining to the petition that he was getting people to sign (3:497). Union supporter James T. Bailey testified that when he observed Miller soliciting (before 7 a.m.) he was carrying the petition on a clip board (9:1642–1644). Miller testified that he circulated the petition in the morning before leaving on his route and on a few occasions after checking in during the afternoon (5:849–850). There were two exceptions to this, he testified. One was the period of 7–13 June when, as part of his vacation, he visited his daughter in Lockhart, Texas (5:846, 970–972; G.C. Exh. 36). The other was 15 June when he came to the plant and obtained permission to be off work that day because of the hospitalization and anticipated surgery on his brother. On his way to the hospital Miller stopped at Region 23's office and filed the RD petition. Miller's brother subsequently died (5:847–848, 913–915).

[47] Recall that Ross Miller was out of the city for 5 working days in early June on vacation: 7–8 and 11–13 June (3:462; 5:846, 971–972).

[48] Such an instruction, if it occurred, likely would have been around 11 July when the parties signed the election agreement scheduling the election for 30 July (G.C. Exh. 4). The Acting Regional Director approved the agreement (Stipulation for Certification upon Consent Election) on 12 July.

[49] On cross-examination Crouse testified that in his first affidavit he erroneously placed the Cook conversation in mid-June because he had no 1984 calendar to inspect when he gave his statement (3:434–435).

[50] He also testified that he never met or spoke with Craine about the petition and did not even go to his office during the first 15 days of June (5:858, 907).

know what was going to happen. Saying he would try to get an attorney for Miller, Gray telephoned Bambace who in turn recommended Attorney Karen H. Susman (5:851–854, 913). Miller contacted Susman (5:876), and there is no dispute that Susman represented Miller in the proceedings on Case 23–RD–542.

When he hired Susman to represent him, Miller did not learn what her fee would be to represent him. This is so, he testified, because he needed an attorney and did not feel that money was important at that point (5:877). After the election, Miller went to Craine (not Gray), gave him $300, and asked Craine if he would take care of the attorney's bill for him.[51] Craine accepted the $300. If Susman charged more than the $300, Miller testified, then Craine paid it because Miller did not (5:854–855, 877, 908).

The parties stipulated that Ross Miller became a supervisor in September 1984 as alleged in complaint paragraph 6 (1:42). Miller places the date of his promotion as 1 September (5:842).

Miller was hired by SDC's predecessor on 11 November 1953, and he has been a driver for over 30 years (5:841). Miller's particular supervisory position is both unique to him and unprecedented at SDC. Although he is not superior to the other route supervisors, he is over all routes as a kind of supervisory trainer in relation to customer relations. He reports to Sales Manager Hunt (5:842, 886–889). It is clear, and I find, that Respondent created the position for Miller.

In their brief at 63–64, counsel for the General Counsel argue that Respondent ''cut a deal'' with Miller whereby it agreed to reward him with a promotion if he would front for Respondent in the decertification movement. They point to the timing of the promotion, observing that it occurred barely 3 weeks after the certification of results, yet Respondent offered no evidence explaining why it took over 30 years for it to recognize Miller's potential talents as a supervisor.

However, in 1983 Miller earned about $50,000 as a driver.[52] As a supervisor he began earning about $31,000 a year (5:885, 972). He received no bonus in 1984, although he hopes to receive a bonus for 1985 (5:886).

In about November 1983 Miller's Achilles tendon was injured when he was robbed. Surgery was performed, his ankle was in a cast for 6 to 8 weeks, and he had to walk with crutches.

In January 1984 Miller approached President Emeritus Gray about the possibility of his moving to some other position since it now was so difficult for him to perform his job with his bad ankle. Because a new position would entail a pay cut, Miller testified that he delayed leaving his driver's position. Eventually, however, ''my leg told me I better get off'' the truck (5:975–977).

Miller testified that in the past Respondent has promoted several drivers or helpers to supervisory positions after they were injured and could no longer perform their route delivery jobs. He named three, and testified that there have been others (5:973).

The General Counsel offered no evidence contradicting Miller's testimony about his ankle injury, his medical need to leave his driver position, or Miller's testimony about Respondent's past practice of having promoted other injured employees to the position of supervisor. Counsel for the General Counsel argue (Br. at 64) that Miller's condition made him ''an obvious choice for fronting a decertification petition in return for a supervisory position.''

In view of Craine's statement to Crouse that Ross Miller would spearhead a decertification movement, and that Miller would be taken care of, it is possible that Miller was promised a supervisor's position if he agreed to lead the decertification effort. On the other hand, the inference seems equally strong that Respondent simply followed its past custom of promoting some injured employees. That inference seems particularly applicable here because Miller had served Respondent for over 30 years.

I attach no significance to Miller's promotion to supervisor, and I shall dismiss complaint paragraph 10(d) which alleges that Miller's promotion was an unlawful reward.

Notwithstanding my dismissal of the reward allegation, I find that when Ross Miller went to President Emeritus Gray on 15 June seeking advice regarding the petition he carried, he showed the signed petition (G.C. Exh. 2) to Gray, and Gray made a copy, or had a copy made, before Miller left his office. I further find that President Craine utilized Gray's copy (or one made from it) in preparing his yellow scorecard, a subject I discuss later.

Although complaint paragraph 10(a) alleges that Craine held meetings with Ross Miller and urged him to file a decertification petition,[53] there is no evidence that Craine in fact either (1) met with Miller or (2) asked him to circulate a decertification petition. The only direct evidence on that point is Crouse's credited testimony that Craine, about 1 June, said Miller would lead the decertification movement, and that about the same time Miller was seen entering owner Georges' office several times. A few days later, at the second meeting of the managerial nucleus, Craine told the managers that Ross Miller and a couple of persons Miller trusted were gathering signatures for the decertification (2:283–285).

Craine's statement to Crouse can be interpreted at least three ways. (1) Craine met with Miller and solicited him to circulate the petition. (2) In a conversation with Miller, Craine learned that Miller was preparing to circulate a decertification petition. (3) Craine heard by the grapevine that Miller was going to circulate a decertification petition. No one interpretation is the most compelling even though the third is the least likely.

The second occasion (Craine's comment to the managers) assertedly occurred after the petition was being circulated. Even the third interpretation is possible here, although it still remains the least likely.

There is too much speculation, and the inferences have to reach too far, to support a finding that Craine solicited Ross Miller to file a decertification petition. I shall dismiss complaint paragraph 10(a).

Complaint paragraph 10(b) alleges that Miller solicited signatures of other unit employees. As this is an allegation Miller did so as Respondent's agent, I shall dismiss the alle-

[51] As Attorney Susman signed the 7 August agreement resolving the challenged ballots which, in turn, led to the revised tally of ballots, and the certification of results, it presumably was about mid-August when Ross Miller tendered the $300 to Craine.

[52] Former Chief Steward Howard Lofton testified that in 1984 it was possible that a driver could make as high as $58,000 (11:2171).

[53] The meetings allegedly occurred from early June through 15 June. As I have found, Craine was on his European vacation during most of that period.

gation. I shall dismiss paragraph 10(c) (the filing of the RD petition) for the same reason.

As for complaint paragraph 12(b), which alleges that Respondent, through Hayes and Crouse, provided additional employees to assist Ross Miller, I shall dismiss the allegation on two grounds. First, the timeframe could well have been during July with Miller talking to employees about voting ''No'' in the election. Even assuming that Respondent appointed Miller as its agent for that purpose, it is questionable whether the appointment, plus the additional employees furnished to do Miller's regular job, would be illegal as a matter separate from some illegal statement Miller could have made.

The principal reason I shall dismiss paragraph 12(b) is that the evidence on the point fails to establish that employees were approached during their worktime. Although Crouse testified about Miller approaching employees as late as 9:30 a.m., I find his testimony on the point unbelievable. Crouse did not specify who the other employees were, and the drivers leave for their routes about 7 a.m. If Crouse meant to say he observed Miller soliciting employees in the warehouse, he certainly did not make that clear. I shall dismiss paragraph 12(b).

4. Withdrawals from the Union and the scoreboard meetings

a. *Crouse's testimony*

Crouse testified that the first item he observed regarding union resignation forms or scoresheets was not a form but a yellow legal pad in Craine's office shortly after the decertification petition effort began, or ''sometime in the first part of June, first to the middle of June.'' (2:300–301) As with his recollection of other dates, Crouse conceded that he was rather confused about the timeframe (2:301–302).

Crouse testified that on this occasion he observed a list of names, in Craine's handwriting, of the employees ''eligible to vote.'' (2:300) One column was to the left of the list of names, and two columns were to the right. In the column to the left Craine had marked a ''C'' or ''U'' (for Company or Union) beside various names. One of the columns to the right designated whether the employee had signed the decertification petition, and the other was checked if the employee had submitted a notice to the Union that he had resigned his union membership (2:300–301, 308–309; 3:439).

Asked whether he saw the list more than once Crouse replied that he had seen it four or five times—all during July (2:309). On the other hand, Craine discussed the list with Crouse ''almost every day'' before and after the RD petition was filed and beginning about the week of 11 June (3:436–437). Hedging, Crouse said ''almost every day'' that he and Craine were available at the Houston office to discuss it (3:437).

Although he did not count the names, Crouse estimates the number at around ''the 107 figure that I think were eligible voters.'' (3:440) On the first occasion when he saw the list Crouse observed that some 30 to 35 names were checked as having signed the decertification petition, and about 20 names were checked as having withdrawn from the Union (3:442, 445). At this point in his testimony Crouse seems to place the incident as being between 11 and 22 June (3:442).

Crouse testified that between 15 June and the election (30 July) Respondent conducted a series of ''scoreboard'' meetings, at least one a week, in Craine's office (2:310). Only the officers and department managers, not the supervisors, attended (2:390). Going down the list of names on his yellow pad scorecard, Craine would ask the managers their opinion on how each employee was ''going to do'' (2:390). Managers would either volunteer or be designated to speak to various employees to attempt to sway them toward SDC's position (2:311). Gray would keep a record of which managers would be talking to which employee, such as, for example, when Crouse volunteered to talk to Rodney Lyons (2:311; 3:531). Craine told the group not to talk to certain employees because to do so would only alert them to what management was doing. Named in this connection were Howard Lofton, Raymond Rice, Sam Tharp, and John Kimbrough (2:311–312).

At more than one meeting, Crouse testified, Craine named several employees who had neither resigned from the Union nor signed the decertification petition. Included were the names of Howard Lofton, Sam Tharp, John A. Holliday,[54] Raymond Rice, John Kimbrough, Franklin Montgomery, Ronald Spina, Richard Jackson, and Rodney Lyons (3:440, 530–532). Crouse apparently dates the first of these occasions as being between 11 and 22 June (3:441–442).

Crouse testified that he no longer has his copy of the scorecard, for it has been destroyed (2:305).

In addition to describing the scorecard Craine maintained on a yellow legal size pad, Crouse testified that on one occasion when he was in Craine's office, office secretary Carrie Jean Skinner came in and gave Craine a handful of papers. On top of the stack were the original handwritten (resignation) letters of employees, and on the bottom, paperclipped together, were some unsigned and typed (resignation) forms (2:307; 3:445–446). Craine said, ''Well, let's see where we stand today.'' On saying this, Craine produced his yellow legal scorecard, and he marked his scorecard as indicated by the letters (2:307; 3:500).

Crouse initially dated this incident as occurring ''shortly after the decertification movement was started by Ross Miller (2:300), or in ''early June.'' (2:306) Saying he could come a little closer than that to the correct date, Crouse estimated that the ''gathering of signatures'' took place in the middle 2 weeks of May (2:307). Perhaps he meant to say the middle 2 weeks of June. His final estimate appears to be that it could have occurred somewhere between 11 and 22 June (3:446). Whatever the date, he saw the resignation forms in Craine's office only that once (2:307).

The record contains copies of letters from 45 employees resigning their membership from Teamsters Local 1111 (G.C. Exh. 15). Dated 15 May 1984, the earliest letter is from Kirk Nelson (G.C. Exh. 15–13).[55] Nelson's handwritten letter is addressed to Skinner. He tells Skinner that he has been on temporary withdrawal from Local 1111, that he has decided not to seek reinstatement to membership in the

[54] There is a John Holliday and a Fred Holliday named in the record. They are brothers. Although only the surname of Holliday appears at this point in the record, the testimony of Crouse at other points makes clear that John Holliday was the person named (2:347, 358; 3:487).

[55] The last letter is dated 9 July 1984 (G.C. Exh. 15–45).

Union, and requests that Skinner forward copies ''of this request to the appropriate parties.''

The balance of the letters are addressed to the Union. A handful of these are handprinted and advise that the signer resigns his union membership. The rest, about 30 or so, are typed and signed. The one-sentence text of the typed letters states: ''I hereby resign from membership in the Brewery, Soft Drink, Industrial & Allied Workers Union No. 1111.'' Except for Nelson's and a couple of others, the letters bear a certified mail number typed (or handprinted on the handprinted letters) in the lower left-hand portion of each letter. Of the 45 letters, 20 bear a date earlier than Friday, 22 June.

Under this heading of Crouse's testimony I shall include a summary of his description of a statement made by Supervisor Robert Gay to driver Kirby L. Johle. Crouse testified that in early July he heard Gay remark to Johle,[56] ''Just think, Kirby, as soon as we get rid of the Union how much better route you can have.''[57] Kirby responded, ''Yeah.'' After Crouse and Gay were alone, Crouse admonished Gay that they were not to make such remarks to employees (2:312–313; 3:479–481). Gay did not address this when he subsequently testified. In crediting Crouse on this point I find that the remark, as alleged, violated Section 8(a)(1) of the Act.

b. *The testimony of Skinner and Craine*

Carrie Jean Skinner testified that she has worked 15 years for SDC, is in charge of the payroll, and handles correspondence and clerical matters pertaining to the Union (16:2817–2818). Skinner testified that in June, after Nelson had given her his letter resigning, in effect, from membership in the Union, several warehouse employees came in also wanting to resign (16:2822, 2824–2825). Apparently these employees, as Nelson, were tendering handwritten notes. Skinner testified that she did not have time to handle the different pieces of paper the employees were tendering (16:2825, 2835). Because she did not want to take these notes, Skinner went to her supervisor, Vice President Ralph Baldwin, seeking relief. Baldwin telephoned Attorney Carolyn Luedke, an associate of Bambace in the Fulbright and Jaworski firm. Luedke sent a note by messenger (2:2825– 2826).

The note (R. Exh. 63) from Luedke advises than on inquiries concerning resigning from the Union, the ''Employer cannot solicit or otherwise encourage employees to resign their membership in a union. However, if an employee inquires how he can resign, it is permissible to respond to the inquiry by giving the employee the following factual information:''

> You can resign your membership in the Union if you choose to do so by submitting a written document to the Secretary-Treasurer of the Union, stating that effective immediately, you hereby resign from membership in Brewery, Soft Drink, Industrial & Allied Workers Local Union No. 1111.

As a final line in her memo, Luedke advised that any information given to an employee should be limited strictly to the above indented sentence.

Using Luedke's memo as a guide, Skinner typed a form letter to the Union with the one-sentence text stating ''I hereby resign from . . . Local 1111.'' She then made copies of the forms that employees could sign. She did this in order to have the documents of uniform size for ease and uniformity in filing (2:2826, 2835–2836, 2841, 2849).

On some of the forms in evidence there is a slight variation either in the placement of a word or two, or by the kind of typewriter used. Thus, it is clear that all the typed forms did not come from a single batch of photocopies. Skinner testified that some of the employees picked up letters and, apparently, returned them later, and that some may have used their own form (16:2845, 2849).

Either Skinner or one of the office clerks typed a certified mail number on many of the letters and mailed them, at SDC's expense, to the Union (16:2841–2842). She testified, however, that in the past she has frequently mailed items for employees, at SDC's expense, to the Union or to the credit union (16:2821).

On Friday, 22 June, Skinner typed a list showing three subjects: (1) employees who had withdrawn from the Union by letter, (2) names of those who were not union members, and (3) the total number of employees in the bargaining unit, showing the number of union members and the number of employees not union members (16:2828, 2836; G.C. Exh. 16). Skinner testified that she prepared the list on her own initiative, that she showed it that day to Baldwin who told her to keep up the good work, and to Craine who thanked her after looking at it for a few moments (16:2839).

According to Skinner, she showed the list to Craine on 22 June because he is SDC's president, because she thought he needed to know who had dropped out of the Union, and because she thought he should know what was happening (16:2829, 2837). She denied that Craine had asked about such data (16:2837). She testified that the occasion of 22 June was the only time she ever showed the list to Craine even though she added names to it thereafter as a ''running'' list, and he never once asked her who had resigned (16:2829, 2837). Although Skinner admits there was a lot of talk at SDC about employees resigning from the Union (16:2829), she denies knowing anything about the decertification matter (16:2838).

According to Craine, it was not until Skinner, in June, showed him the list she typed on 22 June (G.C. Exh. 16) that he learned the clerical staff had prepared resignation letters (G.C. Exh. 15) for employees to sign (1:159; 2:208–209; 13:2322–2324). Even then he did not learn that the clerical staff was mailing the resignation letters, at SDC's expense, to the Union (1:160; 2:209–210). He does not think management ordered or authorized it, but thinks that it just took place (2:210; 13:2323).[58]

Craine's testimony on the 22 June list is a little different from Skinner's. He confirms that in June Skinner brought the 22 June list (G.C. Exh. 16) to him. However, Skinner said that employees wanted to know how to stop the deduction of union dues now that they had resigned their union membership (2:208–209; 13:2324). Craine said he would have to

[56] Johle signed the petition in place 36 (G.C. Exh. 2), and his union membership revocation letter is dated 26 June (G.C. Exh. 16–32).

[57] Complaint par. 17 alleges this to be, in effect, the promise of ''an improved route if the Union lost the election.''

[58] His initial testimony on the point was a flat denial (1:160).

call SDC's attorney. He then called Attorney Bambace. After talking with Bambace, Craine explained to Skinner that there was a window period in which employees could cancel their deduction authorizations based on the date the cards were signed, and he asked Skinner to prepare a list of names with the dates of the dues-deduction authorizations. Skinner and Baldwin, Craine testified, prepared the list. After Skinner showed Craine the ''window period'' list, he gave it back to her so she could be watching for the dates in order to stop the dues deductions at the proper time (13:2325–2326).

According to Skinner, after union dues were deducted for June some of the employees who had signed resignation letters complained to Skinner. She therefore prepared a list of employees with the dates they had signed their dues-deduction authorization (16:2827–2828). However, the list apparently was not typed until 3 August 1984, for that is the date reflected in the upper right corner of the first page (R. Exh. 64).

Craine denies that he maintained any master scorecard, such as on a yellow legal pad, showing who had resigned from the Union or who had signed the decertification petition (1:158–159; 13:2326; 16:2809). The only list he kept, Craine testified, was a copy of the *Excelsior*[59] list (16:2808–2809; G.C. Exh. 17). As explained by Craine, he would take occasional readings from the supervisors at meetings, attended by Crouse, on how they thought employees might vote. He did not mark the list, but simply tried to keep track of it ''in my head'' on the numbers. Because the estimates of the supervisors indicated that SDC would win by a wide margin, taking about 75 votes out of 109 eligible voters,[60] he did not remember names but only numbers, for he figured that an estimate of 75 votes for SDC was sufficient.[61] Because he had no concern about the positions of individuals, no record was kept indicating whether an employee was for or against the Union (16:2809, 2811–2813).

Crouse testified that a copy of the *Excelsior* list (G.C. Exh. 17) was not used at the meetings where supervisors would be asked how they thought employees would vote (2:389). The only occasion he recalls seeing the *Excelsior* list, Crouse testified, was when SDC was preparing a mailout to the employees and Crouse requested a copy of the list so he would not have to write the names by hand (2:389). Crouse testified that Craine did not utilize the yellow scorecard pad at the meetings with the supervisors, but only with the managers (2:390). If Craine took notes at the supervisory meetings, as distinguished from the managerial meetings, Crouse did not describe the process.

Craine equivocated slightly on the subject of whether Skinner periodically showed him the updated version of the 22 June list, the ''running'' list (G.C. Exh. 16), or told him about new resignations. He testified that the list was updated from time to time, but that he could not recall if he ever saw the whole list (13:2321). Moments later he testified that he did not recall whether he saw any updated version of Skinner's ''running'' list or received any supplemental reports, but that he ''probably'' was shown that others had resigned (13:2327). He again said that if there was ''another list'' (meaning an updated version of G.C. Exh. 16), ''I'm sure that Carrie Skinner probably had notified me that these people were on this list.'' (13:2328) Continuing its examination of Craine (as an adverse witness), the Union asked whether Craine got reports from time to time regarding resignations from the Union, and Craine answered that he did not and that any earlier testimony that he had was a mistake (13:2328).

Craine did not specifically deny Crouse's testimony about meetings of just the managers when certain managers would volunteer or be designated to talk to and try to sway certain employees, although he did testify that he did not recall any meetings in his office in June–July with just Craine, Gray, Hayes, and Crouse (16:2812–2814).

c. *Crouse credited*

I credit Crouse on this subject. I find that Craine did utilize a yellow scorecard as described by Crouse. Moreover, I further find that payroll clerk Skinner supplied Craine a copy of her original list (G.C. Exh. 16) of employees submitting union membership revocation letters, and that she furnished him copies of the modified list as she updated it.

As mentioned earlier, complaint paragraph 12(a) alleges a violation by Craine's causing the initiation and circulation of dues-checkoff revocations. There is insufficient evidence that Craine engaged in such conduct. I also find that the limited assistance which Skinner gave Respondent's employees was no more than permissible ''ministerial aid,'' and that the revocations (with the exception of that submitted by Rodney I. Lyons) were the free and uncoerced acts of the employees.[62] See *Eastern States Optical Co.*, 275 NLRB 371 (1985). Accordingly, I shall dismiss paragraph 12(a).[63]

d. *Hayes solicits Lyons to sign the petition and to resign his union membership*

(1) The testimony of Rodney I. Lyons

Alleged discriminatee Rodney I. Lyons testified in support of the complaint allegations that in June 1984 Executive Vice President Bobby Hayes unlawfully (1) solicited an employee to sign the decertification petition and a dues-checkoff revocation, and (2) informed the employee that if he did so everything would be all right for him with SDC and that the employee had everything to gain and nothing to lose by signing.[64]

Lyons testified that in late May, or early June,[65] as Lyons was dismounting from his truck, Hayes approached him and said he needed some help. Hayes explained that he needed some help in showing owner Basil Georges that he could get some blacks out of the Union, and that he wanted Lyons to

[59] *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); 2 *NLRB Casehandling Manual* Sec. 11312 (Apr. 1984).

[60] Skinner's ''running'' list shows a final total of 109 employees in the unit (G.C. Exh. 16), whereas the *Excelsior* list has 108 names (G.C. Exh. 17).

[61] Crouse testified that management expected to win by a ratio of 70 to 30 or even 80 to 20 (2:312).

[62] Not only was the assistance consistent with SDC's past practice, but here the employees are the ones who requested assistance.

[63] As we are about to see, other complaint paragraphs cover the circumstances pertaining to Rodney I. Lyons.

[64] Complaint pars. 13, 14, and 16. Lyons also testified in support of complaint par. 15, an allegation of interrogation in mid-June by Vice President Crouse.

[65] During his initial testimony Lyons placed the incident as occurring in late May rather than early June (8:1395, 1414). As a rebuttal witness, Lyons dated the event in early June (17:3058). This conversation is the subject of complaint par. 13 which alleges the incident as occurring in early June 1984.

withdraw from the Union. Speaking further, Hayes commented that Lyons had been at SDC as long as Hayes and that they both were fully vested in the pension plan. Lyons ended the conversation at that point by saying he would talk to Hayes later (8:1395–1396; 17:3064). Hayes and Lyons are black.

Formerly a member of the Union, Executive Vice President Hayes began his employment with SDC in about 1971 as a driver's helper (16:2853). SDC hired Lyons in August 1971 and fired him on 3 July 1985 (8:1393, 1484). During the relevant time, Lyons was a member of Local 1111, and his membership dues were paid by payroll deduction (8:1394; R. Exh. 64).

About 2 weeks later, Lyons testified, he received a telephone call at home about 6 a.m. from Hayes. On this occasion Hayes said time was running out and he wanted Lyons to sign the decertification petition to show that Lyons was getting out of the Union, for the petition had to be filed in a day or two. Hayes said Kirk Nelson would have the petition, but if he did not then Ross Miller would. Lyons said he would talk to Hayes when he arrived at work (8:1396–1400, 1415; 17:3059, 3064–3065).

About 30 minutes later, after Lyons had arrived at the plant, Hayes approached him in the salesroom and informed Lyons that Nelson did not have the petition, that Ross Miller did, and that Miller was over near the restroom (8:1401, 1415–1416; 17:3065).[66] Lyons went over to Miller and signed the petition (8:1401; 17:3065). Lyons' name is the very last one on the petition (G.C. Exh. 2). He testified that he signed the petition in order to keep his job (8:1402; 17:3065).

In about June, Lyons testified, he also had a conversation about the Union with Vice President Crouse. Dating the conversation as occurring shortly after one of his reported conversations with Hayes, Lyons testified that Crouse asked him why he had not withdrawn from the Union.[67] Lyons replied that he had not thought about it. In order to get rid of Crouse, Lyons said he would talk to Crouse about it later. They never conversed on the subject again (8:1420–1422). Crouse was not asked about this during his testimony. I credit Lyons. As the interrogation was part of a systematic plan, was by a vice president, and would tend to coerce an employee about his basic right under the Act to belong to a labor organization, I find that Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 15.

About a week after his second conversation with Hayes, Lyons testified, Lyons was called into Hayes' office. With just the two present, Hayes told Lyons that he had to sign another document in order to get out of the Union and so that everything could go through as it should, for signing the petition alone was not enough (8:1402; 17:3059, 3063, 3066). Continuing, Hayes said that Lyons would be better off out of the Union because the Union was weak, that it was going to lose the election, and because SDC had more to offer Lyons (8:1403, 1416–1417; 17:3066.

Hayes handed the document to Lyons and Lyons signed it at Hayes' desk (8:1410; 17:3067). Lyons identified one of Skinner's typed form resignation letters (G.C. Exh. 15–44) as the sheet of paper he signed in Hayes' office (8:1409–1410; 17:3067). Addressed to the Union, the letter's one-sentence text states, ''I hereby resign from Brewery, Soft Drink, Industrial & Allied Workers, Local Union No. 1111.'' The word ''membership,'' present in most of the form letters, is omitted from the text here.[68]

Lyons had heard talk among the employees that SDC had a ''hit list'' with union members at the top. Because he feared that his name would be included on the hit list if he did not sign, and that, based on what Hayes had said, signing would help preserve his job, Lyons signed the resignation letter in Hayes' office (8:1410–1411, 1416–1419).

On cross-examination Lyons admitted that most of the members of the unit were members of Local 1111 (8:1419). According to Respondent's records, only about 10 of the bargaining unit's 108 or 109 employees were not on SDC's list for payroll checkoff of union dues (G.C. Exh. 16; R. Exh. 64).

Although Lyons testified that he thought it was June when he signed the letter (8:1402, 1409–1410), the letter bears the date of ''July 5, 1984.'' It is the penultimate of the 45 resignation letters. The last one bears the date of 9 July.

(2) The versions of Bobby Hayes and Carrie Jean Skinner

Denying that he ever telephoned Lyons and asked him to sign a decertification petition, Hayes testified that he was unaware of the petition's existence until Respondent received a letter from NLRB Region 23 notifying SDC that such a petition had been filed in Case 23–RD–542 (16:2862, 2870).

Hayes also testified that he never asked Lyons to sign a letter resigning his union membership (16:2863–2864). What did happen, Hayes testified, is that Lyons came to Hayes' office, displayed Lyons' resignation letter of 5 July (G.C. Exh. 15–44), and said he wanted Hayes to see that he had resigned from the Union. Hayes merely glanced at the letter and asserted that such was the business of Lyons. Hayes was busy, and nothing else was discussed (16:2863). He denies ever having a conversation with Lyons about the latter revoking his dues checkoff and getting out of the Union (16:2869–2870).

Hayes was asked by the Union on cross-examination why he thought Lyons would come to his office and show him the resignation letter of 5 July. In Hayes opinion, Lyons did so as a form of ''blowing smoke'' at the ''ranking black in the company.'' (16:2880)

Carrie Jean Skinner testified that Lyons came to the office and asked for a letter to resign from the Union. She gave him one of the copies from the stack she was keeping, and he signed it on the spot. Rather than returning the letter to Skinner, however, Lyons left saying he wanted to talk to Hayes. Although Skinner did not recall receiving the letter back from Hayes, she testified that he could have left it with one of the other clerks in the office (16:2829–2831).

At the rebuttal stage Lyons denied Skinner's assertions, denied that he took the resignation letter to Hayes' office, and denied that he voluntarily went to Hayes' office. He testified that he was called to Hayes' office where, as pre-

[66] They could not see the restroom from where they were standing (8:1416).

[67] The General Counsel apparently relies on this testimony of Lyons to support comp1aint par. 15. Par. 15 alleges a mid-June interrogation of an employee by Crouse concerning the employee's failure to abandon his union membership.

[68] Lyons eventually received a card from the Union acknowledging the cancellation of his membership (8:1408).

viously described, Hayes said he wanted Lyons to sign the resignation letter (16:3049–3050).

(3) Conclusions

In crediting Lyons, as I do, concerning these events, I find that Respondent violated Section 8(a)(l) of the Act by the conduct of Executive Vice President Bobby Hayes as alleged in complaint paragraphs 13, 14(a) and (b), and 16(a) and (b).[69]

D. *Certain Events in August 1984*

1. Craine's remark to Crouse about getting rid of ''troublemakers''

As noted earlier, on 7 August 1984, following the election on 30 July, the Regional Director approved an agreement by the parties resolving the issue of challenged ballots in Case 23–RD–342 (G.C. Exh. 5). After the challenged ballots were counted, a revised tally, dated 7 August, reflected a union loss by a vote of 55 to 52 (G.C. Exh. 7).[70] The Regional Director issued a Certification of Results of Election on 13 August (G.C. Exh. 8). On that date Respondent held a party in its hospitality room for the drivers and other unit employees as they checked in at the close of the day. Free beer was served.

Between 7 and 13 August, Crouse testified, Crouse and Craine had a conversation in Craine's office in which Craine, after informing Crouse that the election results had been finalized, stated, ''Now we can go ahead and get rid of some of the troublemakers.'' (2:316)[71] Craine went on to name four employees: Howard Lofton, Raymond Rice, Sam Tharp, and Ira Strange (2: 316).

Craine denied ever telling Crouse or anyone that he wanted to get rid of Lofton, Rice, Tharp, and Strange as the first four (16:2803). He did not specifically deny the quote about getting rid of some of the troublemakers. I credit Crouse completely concerning Craine's ''troublemakers'' remark and Craine's naming of certain employees.

2. Craine warns Lofton on 23 August 1984

Complaint paragraph 19 alleges that on or about 23 August Craine told an employee that he had been causing ''trouble'' about the Union's coming in and that Respondent did not need that kind of waves.

In support of this allegation, Howard Lofton testified that he was called to Craine's office about 7:15 the morning of 23 August. Also present at the meeting, besides Craine and Lofton, were Clayton Hunt, the new sales manager succeeding Crouse, and Bob Gay, Lofton's supervisor (10:1992–1993). Craine's first comment to Lofton was that Hunt and Gay were not there as witnesses but merely to understand the situation.

Addressing the reason for calling in Lofton, Craine said he had heard a rumor that Lofton was still talking up union activity among the employees and that SDC was not going to tolerate this, that SDC had a year to prove to the employees what it could do for them and that the Company would not stand for any talk of union activity. Lofton testified that he replied he was there just to do his job, and that he denies ''talking up this activity, per se.'' (10:1993)

Another rumor he had heard, Craine said, was that Lofton's mother-in-law had sold some property and that Lofton was going to receive some of the money and quit his job at SDC. Lofton replied that what his mother-in-law did was her business, but that he had been working there 16 years, so ''why would I want to quit?'' Craine said it was just a rumor. In closing the meeting, he reminded Lofton not to talk anymore about the Union (10:1993–1994).

Acknowledging such a meeting, Craine testified that he had heard reports that Lofton was telling some employees that the election would be overturned and there would possibly be another election. He therefore called Lofton in and told him to cease, that SDC was trying to pull everyone together, and that Craine wanted Lofton to do a good job and stop this discussion with the other employees. Craine names Supervisor Gay as being the only other person present (16:2798–2800).

Confirming that the Union was mentioned in the conversation in the context of the Union's planning to have the election set aside, Craine admits he voiced to Lofton the expression that SDC did not need those kind of waves, but he testified that he could not recall saying that Lofton had been causing ''trouble'' about the Union's coming in, although he might have said it (16:2801–2802).[72]

Craine identified a file memo he prepared on 23 August immediately following the meeting. The memo reads (R. Exh. 61):

MEMO TO FILE

Aug. 23, 1984

> On this date at 6:45 a.m. I had a meeting with driver-salesman Howard Lofton. Bob Gay, Sales Supervisor, was asked to attend as well. I told Howard Lofton that he had been seen contacting some of our employees during working hours and that some of those he contacted told me that he was telling them that the union was going to have the recent NLRB election set aside and that they should be aware of it. I told Howard that we did not appreciate his actions and that I wanted it stopped immediately or we would be forced to take corrective action. I went on to say that we are trying to build a strong team here at Southwest and his job should command all of his attention.
>
> Howard said he would direct his efforts toward his position and that he wanted to do a good job. I told him that was all I could ask and we parted at approximately 7 :10 a.m.
>
> /s/ James E. Craine

[69] I previously found merit to the allegation of complaint par. 15 regarding the interrogation by Vice President Crouse.

[70] Driver Richard Jackson testified that about a week after the election three supervisors asked him how he had voted in the election. I discuss that testimony, and the complaint allegation pertaining to it, as part of the discussion of Jackson's discharge.

[71] Crouse actually dated the event as about ''the first week of August before I had been asked to go to Conroe.'' (2:316) He was promoted to his position of vice president and branch manager of the Conroe operation on Monday, 13 August (2:233). As the revised tally issued on 7 August (G.C. Exh. 7), and as SDC withdrew its objections to the election on 7 August (footnote to G.C. Exh. 8), such a conversation possibly could have occurred between 7 and 13 August.

[72] As the summary of Lofton's testimony shows, Lofton does not quote Craine as using the word ''trouble.''

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As Lofton clearly had the right to discuss the subject of any union efforts to overturn the election, or to mount a new organizing campaign aimed at having a new election a year later, and in view of Crane's total ban on any future union talk by Lofton, under pain of discipline, I find that the General Counsel has established the facts alleged in complaint paragraph 19. Although Lofton did not quote Craine as using the word ''trouble,'' it is clear that Craine considered Lofton's protected conduct as being precisely that—trouble.

I find, as alleged in complaint paragraph 28, that the 23 August conduct of Craine, as described in complaint 19, violated Section 8(a)(1) of the Act.

3. At the instruction of owner Basil Georges, Hayes interrogates and threatens Fred Holliday and others on 24 August 1984; Gray adopts the threat to Holliday

Complaint paragraphs 20–22 contain a series of allegations that on 22 August Hayes and Jack Gray interrogated and threatened Fred Holliday and other employees. The events arise from Respondent's discharge of Louis L. Riley about 21 or 22 August 1984.[73]

There is some difference on who was present at Riley's August termination. Hayes names himself and Clayton Hunt plus Riley and Fred Holliday whom, it is undisputed, Riley had requested as a witness (16:2853–2854, 2871). Neither Hunt nor Riley was asked about the meeting during their testimony. Fred Holliday testified that the discharge meeting took place in Hunt's office and that Craine was present as well as the four named by Hayes (8:1577). Craine was not asked about the meeting by any of the parties. Hayes testified that Riley was fired on the asserted ground that he falsified documents in order to steal money (16:2855, 2872–2874). The truth or falsity of that assertion was not litigated, and the subject is relevant only to show the background of the next meeting which evolved from Riley's discharge.

This next meeting was held in Hayes' office. Hayes testified that about a week after Riley's termination he summoned Fred Holliday to his office because of a report Hayes received that Fred Holliday was still protesting among employees that Riley's discharge was unjust. Angered by this report, Hayes called in Holliday plus drivers Ira Strange, Joe Dixon, and Jimmy Manning (16:2856–2857).

Called as witnesses by the General Counsel, Fred Holliday and Ira Strange testified concerning the meeting. No party called Joe Dixon or Jimmy Manning. Fred Holliday dates the discharge meeting of Riley as 22 August (8:1577) and the subsequent meeting as a day or two later (8:1579; 9:1629). The second meeting began about 6:45 a.m., Holliday testified. In addition to the attendees listed by Hayes, Fred Holliday names Sales Manager Clayton Hunt (8:1579). Hunt was not asked about this meeting during his testimony.[74]

Ira Strange names the same attendees as Fred Holliday (6:1092, 1147–1148). At the hearing Strange dated the meeting as 22 August (6:1092), 1147), but in his pretrial affidavit of 26 March 1985 he placed the meeting on 23 August (U. Exh. 5 at 5).

Hayes testified that at this meeting he told Fred Holliday of the report that Holliday was still carrying the banner for Louis Riley by complaining that his discharge was unjust. Hayes said he did not like it, for he thought the matter was closed. He then explained to Strange, Dixon, and Manning SDC's reason for terminating Riley. Hayes then told the employees that he did not want to hear any more talk that Riley had been treated unfairly. To Holliday Hayes said, ''If you're preaching about Louis Riley, I wish you would preach about something else.'' (16:2857) Hayes testified he singled out Fred Holliday because the report named Holliday, and not because Hayes considered Fred Holliday a leader among the black employees (16:2879–2880).

Hayes did not explain at the hearing why he called in Strange, Dixon, and Manning as well as Fred Holliday. Fred Holliday concedes that all the employees talked about the subject, and that he had talked with Strange, Dixon, and Manning about it (9:1628–1629). Holliday testified that he, Louis Riley, Strange, Dixon, and Manning are black (8:1579). Executive Vice President Hayes is also black.

Fred Holliday testified that the meeting began with Hayes announcing they had been called in because SDC had heard of secret meetings being held, that the employees present were supporting Louis Riley, and that Fred Holliday was the ''ringtail'' leader of the group (8:1579–1580.[75] Holliday assumed that in referring to the employees supporting Riley, Hayes meant that they did not think Riley's termination was fair (9:1629). Holliday testified that Hayes polled the group, asking each one whether he had attended any secret meetings, and each employee denied attending any and denied even the existence of such (8:1580).

Hayes continued, Holliday testified, by asserting that owner Georges had said to tell Fred Holliday that he is preaching in the wrong place if he was preaching about Louis Riley, and that from that day forward Fred Holliday should be seeking employment elsewhere because there was no more union and no more need for any union stewards (8:1580; 9:1629). Holliday never served as a steward (9:1601). Nevertheless, if Holliday is credited, it is clear that owner Georges considered Fred Holliday's concerted activity to be the type of conduct a union steward would engage in.

Hayes denied that he mentioned the name of Basil Georges, referred to secret meetings, or mentioned union (16:2857–2858). He also denied that there is a leader of the blacks, denied that he considered Fred Holliday to be such, and testified that he simply considers Fred Holliday to be a man (16:2879).

Strange testified that Hayes called Fred Holliday the leader and told Holliday that if he was going to preach he should go preach someplace else and preach and not preach about Louis Riley, that since there was no longer a union at SDC, Holliday should get a job where there was a union (6:1093, 1148–1150, 1151, 1186).

[73] The record contains several references to both 21 or 22 August as being the date of Riley's discharge. The original complaint shows the date as 21 August.

[74] Hunt was the General Counsel's first witness, and Respondent called him briefly on the last day.

[75] As we see in a moment, after leaving this meeting Fred Holliday went to the office of President Emeritus Jack Gray. In the conversation with Gray, Holliday spoke as if Hayes had quoted Basil Georges as describing Fred Holliday as the black leader. Whether through inadvertence or whatever, Holliday did not include that when he testimonially described what Hayes said to him and the others. Thus, if Holliday intended to report that at the hearing, he omitted doing so.

On cross-examination Strange denied that Hayes said Fred Holliday was a leader of the blacks, testified that he did not consider Holliday to be such, and had no recollection of Hayes' saying anything about secret meetings (6:1149–1150).

During redirect examination by the Union, Strange, after having various passages in his 26 March 1985 pretrial affidavit read to him, confirmed that at the meeting Hayes spoke as expressed in the affidavit (6:1188). The portion so confirmed reads (U. Exh. 5 at 6):

> Fred, you are the leader. You're preaching and you ought to go someplace else to work. There's no union here. If you want a union you need to get a job where they have one. This goes for all of you.

When Fred Holliday left the 24 August meeting in Hayes' office he went to the office of President Emeritus Jack Gray (8:1580; 9:1630). Holliday considered Gray to be a friend (9:1630). Holliday asked Gray if there was truth to Hayes' statement that owner Georges considered Fred Holliday to be ''the black leader'' or ''leader of the blacks.'' ''Responding, Gray said his staff had given him that information (8:1581; 9:1632). Gray expressed the opinion that if Holliday felt so strongly about the Union that Holliday should be seeking employment elsewhere (8:1581).[76] Holliday said he was being falsely accused, that there were no secret meetings, that he was not trying to serve as leader of the blacks, and that all he wanted was to do his job and forget the rest (8:1581; 9:1602).

Acknowledging he had a meeting With Fred Holliday in late August, Gray testified that Holliday came to him upset following a meeting with Hayes in which, Holliday reported, Hayes expressed surprise that Holliday was saying SDC had unfairly discharged Louis Riley. According to Gray, he suggested that if Holliday was that upset then he should go down the hall and talk with Craine. Gray denies that the word union or the name of owner Georges was mentioned by either of them (17:2975–2977). Gray did not address Holliday's testimony about ''the black leader'' or ''leader of the blacks.''

Strange (6:1151) and Fred Holliday (9:1630) confirm that during the relevant time Holliday, in addition to his job as a driver-salesman for SDC, was a preacher of a church the denomination of which is unspecified in the record. Thus, it appears that Holliday is a minister in some denomination, and that ''preaching'' is not simply an adjective descriptive of some vocal trait. Whether owner Georges and Hayes were aware of Holliday's service as a minister or, possibly, considered that Holliday had a nickname of ''preacher'' is immaterial. The point is that Hayes, quoting owner Georges, referred to Fred Holliday's protected ''preaching.''

I find that the group meeting occurred about 24 August 1984, and I credit Fred Holliday, essentially supported by Ira Strange, in his account of that meeting with Hayes. Thus, I find that Hayes spoke as Holliday described. I further credit Fred Holliday in his version of his 24 August conversation with Gray.

[76] On cross-examination Holliday testified that Gray did not threaten him about his union activities (9:1630).

In light of the foregoing, I find that Respondent violated Section 8(a)(1) of the Act by the conduct alleged in complaint paragraphs 20(a), (b), (c), 21, and 22(a) and (b).[77]

E. *The Discharges*

1. Introduction

a. *Grounds and dates of discharges*

There are 10 terminations in issue here, 8 in 1984 and 2 in 1985. Respondent admits that it discharged 9 of the 10, but contends that the other one, Fred Holliday, quit. For convenience, at times I refer to them all as dischargees. One unusual feature in this case is the rather long service record of the alleged discriminatees as appears below. Although the below-stated numbers average 13.5 years, the actual average is closer to 14 years because the stated years do not include the month exceeding the last full year. Chronologically the terminations occurred as follows:

1984

Raymond L. Rice—29 August—12 years
Howard Lofton—30 August—16 years
Sammy L. Tharp—30 August—6 years
Fred Holliday—10 September—16 years
Walter John Kimbrough—11 September—13 years
John A. Holliday—30 October—7 years
Edward Hartman—21 November—12 years
Ira C. Strange—28 November—14 years

1985

Richard D. Jackson—3 July—26 years
Rodney I. Lyons—3 July—13 years

The employees can be grouped by the basis of their terminations. First, four of the first five names were fired on the asserted ground of having overage beer on their routes: Rice, Lofton, Tharp, and Kimbrough.

Fred Holliday alone occupies the second category. As mentioned, the question is whether he quit or was discharged.

Group three consists of John Holliday, Hartman, and Strange. Each was fired because, Respondent asserts, he failed to report a vehicular accident.

Fourth, and last, Jackson and Lyons were fired because they missed delivery stops.

b. *The new work rules*

The negotiated collective-bargaining agreement for 1984–1988 (G.C. Exh. 18) contains, as appendix B, two lists of rules.[78] The first group is a set of 48 general work rules, and the second is a list of 46 safety rules. Penalties are provided for violations. Violations of some rules result in progressive

[77] Complaint par. 22(a) alleges that in the conversation with ''employees'' Gray said Supervisor *Bob Gay* was ''very upset about Holliday's leadership among black employees.'' That is probably a garbled version of the reference to Basil Georges. Even though I find that the name of Basil Georges was litigated, there is no direct evidence that Georges said he was upset. Nevertheless, the facts found support an inference that such was what Georges either said or implied, and I so find.

[78] The rules also appear in evidence as a separate exhibit (R. Exh. 7).

discipline, while others call for discharge at the first transgression.

Notwithstanding the penalties specified for any offenses, a postscript paragraph grants SDC complete discretion to impose a lesser penalty. Thus, (G.C. Exh. 18 at 37–38):[79]

> The Company may, when it determines in its discretion that the circumstances warrant, impose a lesser penalty for a particular offense, but the imposition of a lesser penalty for the first or subsequent offenses shall not preclude the Company from imposing the maximum penalty for any subsequent offense or be deemed a precedent. While the Company shall endeavor to enforce all rules uniformly, failure of the Company to enforce all rules with complete uniformity shall not excuse any violation of such rules or justify reduction of any penalty provided for violation of such rules.

As summarized earlier, the proposed new rules were read in full at the ratification meeting of 30 May (9:1704, Rice). Business Manager Wells and Union Attorney Ted Kuhn apparently took turns for the lengthy process of reading the entire contract and the rules to the assembled members (8:1542–1543, Jackson). Thus, when Respondent implemented the provisions of the negotiated collective-bargaining agreement of 1984–1988 on 1 June 1984, the new rules went into effect on that date.

SDC previously had in effect a set of 39 general work rules. A written copy of the earlier rules, dated ''July 1, 1981'' and appearing over the typed name of President John P. Fauntleroy, is in evidence (U. Exh. 4). These rules do not specify progressive penalties, but provide simply, in a final note, that SDC ''will consider violations as cause for discharge.''

During the week of 18 June, Craine testified, he personally taped a copy of each page of the new (but unexecuted contract and rules to the glass wall which separates the sales and keg departments (13:2308). Crouse confirms that the document, including the rules, was so displayed around 18 June or so (2:393; 3:424).

Craine testified that Respondent made two or three preelection speeches to the employees, and that he gave one of them in about July (13:2311–2312). During his talk, Craine testified, he told the employees to make sure they reviewed the rules posted on the glass partition, and that it was their responsibility to know the rules (13:2315).[80] Indeed, when the rules were posted the week of 18 June Crouse told his supervisors to have their drivers read the rules, and he further told them that he expected to have the rules enforced (3:424).

c. *SDC's hit list''*

Crouse testified that beginning before the negotiations in the spring of 1984, and extending until Crouse left for Conroe near mid-August 1984. there were meetings of Respondent's managers. One of the subjects discussed was the need to terminate certain employees for a variety of reasons (2:323). The reasons included poor performance, unkempt personal appearance, insubordination, drunkenness, improper driving habits, and drinking on the job. Union affiliation was not one of the reasons. Crouse testified that Executive Vice President Hayes dubbed it the ''hit list,'' and Crouse explained that it included union members as well as nonunion employees (2:324–325).[81]

In one of the earliest of these conversations Crouse did his best to add a couple of names to the list (2:346).[82] The discussion included the names of Lofton, Rice, Walter John Kimbrough, Tharp, Eddie Hartman, John Holliday, Ben Bender, and Jerry Long. Richard Jackson was not named (2:347). Crouse apparently suggested the names of Kimbrough, whom he described as an alcoholic who had rejected Crouse's suggestion that he obtain treatment under the plans provided by both ABI and the Union (2:324, 356; 3:486–490),[83] and Sam Tharp. Crouse suggested Tharp because of his disinterested attitude which resulted in poor performance (2:357–358; 3:486, 490–492).[84] Although John Holliday was named by the managerial nucleus as one of those on the hit list (2:347).[85] Crouse first would have demoted Holliday to the position of helper and attempted to train him to improve his math skills (2:358; 3:487).

During questioning by the Charging Party, Crouse testified that he did not recall the name of Rodney Lyons being mentioned as one of those on the hit list (2:348). Nevertheless, Crouse described Lyons as being exceedingly lazy and unproductive, and Crouse asserted that had he remained in Houston, Lyons would have been terminated on proper documentation (2:348). Despite Crouse's low opinion of Lyons' productivity, Crouse never specifically testified that he sought to add Lyons' name to the hit list. So far as Crouse was aware, the hit list was never reduced to writing (2:351).

The General Counsel contends that additional confirmation for the existence of a ''hit list'' of union supporters Respondent intended to fire comes from evidence that Supervisor Mel Cook, on separate occasions, cautioned known union supporters James T. Bailey and Richard D. Jackson that they were in line to be fired.

Bailey testified that about early September 1984, in front of a drive-in grocery at Vollmer and Sherwood, Cook said that if Bailey could find a job he should do so because ''they were going to get'' Bailey ''sooner or later.'' (9:1679)[86] Hired in 1959, Bailey is still employed by Respondent. However, he has been off work since 16 November 1984 because of a back injury (9:1634).

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[79] R. Exh. 7 appears to be a retyped copy of the rule appearing in G.C. Exh. 18. Because R. Exh. 7 contains a typographical error in the quoted paragraph (''nor'' rather than ''for''), I have copied from G.C. Exh. 18.

[80] Whether this was the speech Craine made on 25 July is unclear (1:160;2:182).

[81] Hayes denies that he in fact had a hit list, although he testified that from time to time he would express to different sales managers, including Crouse, his criticisms of the dirty uniforms and the unkempt appearance of different employees (16:2865–2866).

[82] Although Crouse at this point referred to the spring of 1985, it is clear that he meant 1984.

[83] Kimbrough denies that Crouse ever approached him with that suggestion (17:3036–3037), and he denies having a drinking problem (17:3037). I will cover this point in more detail later.

[84] As we shall see, Tharp was reinstated in the spring of 1984 pursuant to an arbitrator's decision. Crouse felt that Tharp should never have been reinstated, and Crouse testified that Tharp's performance remained consistently low after his reinstatement (2:358; 3:490–492).

[85] Apparently John Holliday was so named because, as Crouse testified, Holliday was deficient in the arithmetic Skills a driver-salesman needs for preparing paperwork and handling money (2:358).

[86] The complaint does not allege Cook's statement to Bailey to be violative of the Act.

As we shall see in more detail during the discussion of the discharges of drivers for having old, or overage, beer on their routes, Respondent, had it been out to get Bailey, was presented with the opportunity to do so in November. By 9 November 1984 several union supporters had been fired in recent weeks on the ground of having old beer on their routes.

About 9 November 1984, Bailey testified, he was called into Hunt's office. Supervisor Cook also was present. They told Bailey three or four cases of old beer had been found at some stores on his route. Expressing the view that Bailey was a valuable employee, Hunt and Cook said that both owner Georges and resident Emeritus Gray knew Bailey to be a good driver-salesman and that his departure would be a loss to SDC. Hunt and Cook cautioned Bailey, and Bailey said he would try to keep a closer watch (9:1640–1641, 1668–1670). The alleged overage beer was not shown to Bailey. As noted earlier, a few days later Bailey injured his back, and he has been off work ever since.[87]

Jackson testified that in early June 1985 Cook informed him that he and Bailey were the next two on the ''list'' to go.[88] When Jackson observed there was nothing he, Jackson, could do to prevent it, Cook instructed him not to reveal that Cook had leaked the information to Jackson (8:1521). Jackson worked for SDC for over 26 years, from 1959 to his discharge on 3 July 1985 (8:1506, 1559).

Cook testified that a month or two before Jackson's termination Jackson came to him and said he had heard that he was next on the ''list,'' and he asked Cook if he were the next to go. Cook responded that he knew nothing about any list or about the subject. He denies telling Jackson that he was next on the list to be terminated, testified that Jackson's question surprised him because they are not confidants, and testified that he does not know what would prompt Jackson to ask such a question (15:2669–2670, 2685–2686). Cook was not asked about the conversation Bailey described.

I credit Bailey and Jackson on this subject.[89] Having found that the General Counsel established the facts alleged in complaint paragraph 25, I also find that by Cook's statement to Jackson in early June 1985, Respondent violated Section 8(a)(1) of the Act.

It is clear that the hit list was a concept separate from Craine's yellow legal pad ''scorecard'' (2:351). Thus, Crouse testified that there was no correlation between the hit list and Craine's yellow scorecard, although there was some overlapping of names (2:351).

Crouse did not explain in detail the overlapping. As the main column of Craine's yellow scorecard contained the names of all unit employees, there necessarily would be an ''overlapping'' or repetition of names. What Crouse apparently meant is that some or all of the names on the hit list were also checked under one or more of the other columns on Craine's yellow scorecard.

Recall that Craine's scorecard had three additional columns. To the left of the employee's name was a column for marking ''C'' or ''U'' to indicate the anticipated vote by the employee in the upcoming election of 30 July. To the right of the names were two other columns indicating whether the employee had signed the decertification petition, signed a union membership resignation letter, or both.

Crouse testified that it was as to the latter two columns that nine names repeatedly were mentioned by Craine at management's scoreboard meetings as not having signed either. These nine were (3:439–441, 530–532):

John A. Holliday	Franklin T. Montgomery
Richard Jackson	Raymond L. Rice
Walter John Kimbrough	Ronald L. Spina
Howard Lofton	Sammy L. Tharp
Rodney I. Lyons	

As with the ''hit list,'' this group of nonsigners, so far as Crouse knows, was never placed on any separate written list (3:440–441). On the other hand, three of the employees were consistently discussed at the scoreboard meetings as being ''solid, grieving, union members'' (3:535): Lofton, Rice, and Tharp.

As Crouse testified (3:532), and as we shall see in more detail when I discuss the various discharges, Lofton was the Union's chief steward, Rice was a union steward, and Tharp had been reinstated through arbitration. There is evidence, discussed later, showing that owner Georges was outraged at having to reinstate Tharp.

2. The discharges for stale beer

a. *Rule 29 and the late September conversation between Daniel Crouse and Clayton Hunt*

Rule 29 of the new rules provides (G.C. Exh. 18; R. Exh. 7):

> Our supplier has a strict stock rotation policy and procedure which your company subscribes to and follows. It is mandatory that route salesmen and helpers check stock rotation on each and every retail call made. Warehousemen will check stock rotation on each delivery truck loaded. (When extenuating circumstances exist, there will be no discipline involved. Extenuating circumstances will be investigated immediately by the Company.)

The penalty specified for a first offense violation of the rule is discharge. This is the rule used to discipline employees having out-of-date beer on their routes. No distinction is made in the rule concerning whether the driver finds and reports the old beer, or whether the rule applies only if a supervisor, in monitoring a route, discovers unreported old beer.

Under Fauntleroy's July 1981 rules, superseded by the foregoing. Rule 30 reads (U. Exh. 4):

> It is mandatory on the part of Anheuser-Busch that we rotate stock, in the warehouse, on our trucks and in our retail accounts and that we pick up any out of date product in the trade with TABC approval at your company's expense. Therefore, it is mandatory on the part of each employee to rotate product on every retail call.

There is no question that at frequent intervals before and after 1 June 1984 SDC's managers stressed to the drivers the importance of their rotating the product in the retail accounts

[87] Of course, he perhaps has returned to work at some point after his 20 November 1985 testimony.

[88] Complaint par. 25, in conjunction with conclusionary par. 28, alleges this statement to be a violation of Sec. 8(a)(1) of the Act.

[89] The General Counsel argues that such evidence confirms the existence of a ''master plan'' by Respondent ''to rid itself of union adherents. (Br. at 79.)

and of keeping their routes free of overage beer. Even so, Crouse testified he could not remember a single route that was entirely free of overage beer, and that in the past this was handled by oral warnings (1:246). Testimony by some of the supervisor witnesses called by Respondent confirms this.

Clayton Hunt testified that before he succeeded Crouse as sales manager of the package department, Crouse warned all the drivers at one of the weekly meetings of the package department that having old (overage) beer on a route would be a dischargeable offense, and that Crouse told them they were liable to be fired if old beer is found on their routes (1:98–99, 133–134). Driver Lofton (11:2151) denies this, and Crouse denies ever telling any employee that having old beer on a route was a dischargeable offense (2:247; 3:494). I credit Lofton and Crouse. For reasons which appear later, I disbelieve Hunt on every point not confirmed by credited evidence.

In fact, as stipulated by the parties, from the time Craine became president in August 1982, no drivers were discharged for having old beer until Rice, Lofton, Tharp, and Kimbrough were fired for that reason (1:149–150).[90] Craine could not recall any other drivers having been fired after the four for old beer (13:2336–2338), and he attributes to coincidence the fact that all four were union supporters (13:2323, 2335). Before the election that would make sense, for approximately 90 percent of the bargaining unit were members of the Union. After the election, however, and after so many members revoked their membership in the Union, less than a majority of the unit supported the Union. In these circumstances, the ''coincidence'' begins to take on the taint of mathematical improbability.

Although Clayton Hunt claimed (1:71) that under SDC's policy (presumably a reference to the new rules) old beer on the route results in ''automatic dismissal,'' Craine testified that in his July speech to employees he intended for the drivers to understand that SDC, in its discretion, might decide to impose a lesser penalty than the one specified for the violation of a rule (13:2315). Of course, the rules specifically accords SDC discretion.

According to Hunt, around early to mid-August, at the first sales meeting he conducted after becoming sales manager, he told the assembled drivers that having old beer on a route was a dischargeable offense (1:132–133). Denying Hunt's assertion, driver James T. Bailey testified that at the weekly sales meetings before Rice, Lofton, and Tharp were fired for having old beer on their routes, he never heard any supervisor or manager mention a penalty for that situation (9:1635). Indeed, Bailey continued, it was at the very next sales meeting following their discharges that Hunt informed the drivers he had discharged some employees for having old beer on their routes.[91]

Hunt said that one of the discharged employees even had 16 years of service, and that although it was difficult to let someone go with 16 years of service, he nevertheless had to do it. Hunt concluded the point by telling the assembled drivers that if they had any old beer on their routes he wanted it cleaned up because SDC would not tolerate the presence of old beer. Bailey and his helper immediately rechecked their route and found a small amount of old beer (9:1637–1638, 1664–1665). On cross-examination Bailey conceded that Hunt's dogmatic interpretation of the rules was different from that of his predecessors, Dan Crouse and Les Mattinson (9:1665). I credit Bailey rather than Hunt.

Hunt's 31 August announcement to the employees that he had fired some drivers, including one with 16 years' service (Lofton), for having old beer on their routes, and his warning them they had better purge their routes of old beer, were effective.[92] From Tuesday, 4 September through the balance of September 1984, Respondent reported a tidal wave of old beer to the TABC. Thus, as reflected in General Counsel's Exhibit 37,[93] during the first 8 months of 1984, Respondent made 151 reports of old beer (usually no more than two or three cases) showing approximately 481 cases.

By contrast, during September alone Respondent filed 234 reports (G.C. Exh. 37:155–389) requesting the TABC to authorize it to pick up some 740 case.[94] I count some 820 cases for the first 8 months of 1985 (ending 23 August). The number of reports, some 298, more than doubles the approximately 146 reports made in 1984 through 23 August.

Still, we have the testimony of James Bailey, whose support of the Union was well known, that in November 1984 he received no more than an oral warning for three or four cases of old beer supposedly found on his route (9:1640–1641, 1668–1669). However, I note that in both 1982 and 1983 Bailey had the ''top rated'' route by virtue of having the highest volume of route sales (9:1662, 1687). In other words, Respondent recognized Bailey as its highest producer in 1982 and 1983. He was injured in 1984, and the record does not project whether he would have had the highest productivity figures for 1984 absent his injury. The Union argues that Respondent, having fired several of the union leaders, ceased discharging employees for having old beer after the Union filed the initial charges in this case in September 1984 (Br. at 26).

Former Vice President Crouse described a conversation he had with Hunt at the Woodlands Country Club in late September or early October 1984. The occasion was a golf tournament which Respondent had sponsored for some of its customers (2:317–318). During the conversation on business matters in general, Hunt stated that owner Basil Georges had told him (2:318):

> I thought Les Mattinson was a tough sales manager, but you are the meanest son-of-a-bitch that we've ever had

[90] Current Sales Manager Clayton Hunt testified that so far as he knew Raymond Rice is the first driver in SDC's history fired for having old beer (1:131–132). Similarly, Supervisor Wi11iam T. Spears testified that in his 28 years at SDC he has not known of a driver having been fired solely for (unreported) overage beer on his route (15:2649).

[91] Bailey dated this sales meeting as Friday, 31 August (9–1637). Sales meetings normally were held on Mondays, but as the next Monday, 3 September 1984, was the Labor Day holiday, it is quite possible that Hunt did hold this sales meeting on Friday morning.

[92] Unfortunately for Rice, Lofton, and Tharp, Hunt's de facto amnesty program was installed only after they had been fired.

[93] G.C. Exh. 37 is a 1132-page exhibit, in three volumes, containing all the reports Respondent could locate and, so far as known, all that it has, of old beer SDC made to the TABC from 3 January 1984 through 23 August 1985 (2:202). The reports are numbered in chronological order in the exhibit. A very few blank pages are included and numbered (pp. 93–95 and 555), and two pages consist of a law firm's letter apparently inadvertently included (pp. 992–993).

[94] During August 1984 SDC submitted 15 reports to the TABC (G.C. Exh. 37:140–153).

> here. Crouse couldn't have done what you've done these last few weeks.

Crouse asked Hunt what he was referring to, and Hunt said, ''The discharges we have been going through.'' Crouse asked what reasons he had been using for the discharges, and Hunt replied, ''Old beer and improper rotation.'' (2:318; 3:522)

Crouse said, ''Clayton, that's ludicrous. There's old beer and improperly rotated beer on every route that Southwest Distributing has ever had at any time.'' Hunt replied (2:319; 3:522):

> That's what I've been told to do, and that's what I'm doing.

Crouse was unable to fix the exact words, and his quotes vary from that shown to ''I do what I'm told to do'' and ''I did what I was told to do.'' (3:522) The essential meaning is the same whichever quote is used.

When Hunt was called by Respondent to the witness stand the final day of the hearing, he did not address the subject of the conversation between him and Crouse at the Woodlands Country Club. I credit Crouse.

b. *Howard Lofton*

(1) General facts

Hired by SDC on 23 August 1968, Howard Lofton had worked 16 years for the Company when, on 30 August 1984, Respondent fired him (7:1301; 11:2110). As the leading supporter of the Union, Lofton had served in several union capacities before becoming chief steward in January 1984 (7:1302; 11:2027). Lofton worked as a driver-salesman on route 31 under Supervisor Robert Gay.

Lofton was terminated on 30 August in the office of Executive Vice President Hayes in the presence of Hayes, Hunt, and Gay (10:1994). Hunt is the one who fired Lofton.

Lofton testified that Hunt pointed to some beer stacked on the floor, said the beer had been in several named accounts on his route, that it was out of date, that SDC's quality control policy could not tolerate this, that owner Georges risked losing the distributorship over such as this, and that Lofton was terminated (10:1995).

Lofton stated he knew this was going to happen because he had learned the previous day he was on SDC's hit list. When they asked what hit list, Lofton told them never mind, that he would pursue his own remedies (10:1995–1996).

Hunt testified that he fired Lofton for having old beer on his route, that the old beer was the only reason he discharged Lofton, and that under Respondent's policy old beer calls for automatic dismissal (1:70–71, 77). He testified that Robert Gay, Lofton's supervisor, reported the old beer to him, and he identified the lists of old beer Gay submitted (1:71–76).

At the hearing Gay identified the reports he submitted and signed on which Hunt relied (14:2457–2463; G.C. Exh. 19; R. Exh. 41). The report pages reflect that on 29 August 1984 Gay purportedly found old beer on Lofton's route at four different stores.[95] The quantity ranged from two six-packs at one store to a high of three six-packs at another. The beer reportedly ranged from 3 days to 32 days stale.

Gay testified that in all of 1984 he found old beer only on Lofton's route; he could not recall finding even a single can of old beer on the route of any other driver during 1984 (14:2480). Indeed, in his over approximately 4 years experience as a supervisor, and having been in charge of different routes over the years, Gay supposedly found out-of-date beer on the route of only one driver—Lofton (14:2488). Gay testified unpersuasively, and I disbelieve him as a witness.

Gay testified that he made no recommendation regarding discipline of Lofton for the overage beers he found on 29 August (14:2466). Hunt testified that Respondent's route supervisors, such as Gay, have no authority to recommend termination (1:136).

James A. Bastida was Lofton's helper. When Lofton was fired for having old beer on the route, Bastida quit because he thought Lofton's discharge was unjust in that the old beer ground was fake (5:984, 995). Bastida testified that for about a month before 30 August Lofton and Bastida increased the frequency they rotated the beer on their route because Lofton felt Respondent was going to discharge him (5:985–986). Bastida testified that there was no old beer on the route when Lofton was fired (5:986). Lofton modifies that slightly to say that there was no unreported old beer, for he had reported some old beer in recent weeks as part of his survival effort (10:1989–1991).

Once or twice a year, Lofton testified, a supervisor would ride with the driver to monitor such things as beer rotation on the route.[96] Lofton testified that on 15 August Supervisor William Jordan monitored Lofton's route. At the end of the day Jordan told Lofton that overall the route looked ''very well'' and that he had found only a single can nearing overage, with 3 days left, and that Jordan had simply purchased it to remove it from the market (10:1991–1992). When called as a witness by Respondent on the antepenultimate day of the hearing, Jordan was not asked about this testimony. I credit Lofton.

To the question of whether he had ever been ''written up'' for any misconduct while employed at SDC, Lofton answered that, to his knowledge, he had never received any reprimand (10:1992). Supervisor Gay testified that he checked Lofton's route the week of 26 March 1984, found numerous out-of-date items (ranging from singles to a full case) at nine stores, discussed it with Lofton, orally warned him not to let it happen again, and submitted a written report (R. Exh. 19) to his own superior on the matter (14:2454–2457, 2498). Gay does not recall whether he gave a copy of the report to Lofton (14:2497).[97]

Lofton testified that he never saw the report until his unemployment compensation hearing before the Texas Employ-

[95] Gay's handwritten reports of 29 August, included in G.C. Exh. 19, were typed on 11 September and signed by Gay (G.C. Exh. 19; R. Exh. 41).

[96] If Lofton was describing Respondent's ''All Aboard'' program, Craine differs. Craine testified that under the ''All Aboard'' program supervisors would accompany the drivers on their routes once or twice a month (1:151–152; 2:185; 7:1262–1263).

[97] Although the General Counsel argues that under the then current contract (U. Exh. 32; R. Exh. 37) the warning was void if the employee and the Union were not each given a copy (Br. at 13, 94), the old contract, art. I, sec. 6, merely provides that the disciplinary action will not be effective if the ''reason'' is not given to the employee and to the shop steward at the time of the discipline. Lofton was the chief steward. However, as the Union points out in its Br. at 19, Craine testified it was SDC's policy for an employee to be given a copy of any written reprimand placed in his file (16:2812).

ment Commission (TEC) following his discharge (11:2079–2082; 17:3010–3011), and he is certain that Gay never spoke to him about such a matter (11:2079–2080). I credit Lofton.

As observed by the General Counsel, the purported warning by Gay during the week of 26 March follows by only a few days an incident involving Tharp, Lofton, and owner Georges. As we shall see later in more detail, Respondent fired Tharp on 3 May 1983, but on 20 February 1984 Arbitrator John F. Caraway awarded Tharp reinstatement, but without backpay (R. Exh. 10). Tharp returned to work about 28 February.

As he prepared to leave the salesroom for his truck on 17 March, Tharp testified, owner Georges approached him and said, ''You're Tharp, aren't you? I want to talk to you outside.'' When they stepped outside to the parking lot Georges told him, ''You're a goddamn jackass. You really have a lot of guts coming back to work for me and taking my money from me. What do you have against Greeks?'' ''Nothing,'' said Tharp, and he then asked Georges if he would repeat his statement in front of witnesses. Georges replied that he would do so before any ''union buddies'' Tharp wanted to get (3:563–564). Tharp went back inside to look for Lofton, and Georges apparently went to the main building.

Crouse testified that in March as he, Craine, and Vice President Ralph Baldwin were standing in the hallway near Georges' office, Georges came in the building and remarked to them, ''I just cornered that stupid jackass out on the parking lot. I can't believe we had to take him back.'' Crouse was aware that Tharp had been reinstated (2:334–335).

In the meantime Tharp had found Lofton, and the two of them located Georges in Gray's office (3:564; 11:2022). Georges again asked Tharp what he had against Greeks, and Tharp answered as before.[98] After a question as to whether Tharp had even been in the military, Georges remarked that there were not 10 men in the Union who would back Tharp on any given point and, pointing at Tharp, told him that the Union could do him no good (11:2022–2023, Lofton).

Georges then told the two that if they missed one stop or did anything wrong they both would be gone (11:2023).[99] Tharp asked if he would repeat what he said on the compound, and Georges said, ''No, I don't mind whatsoever. You're a goddamn jackass. Now either get off the compound or get on the truck and go to work.'' (11:2023). Georges and Baldwin did not testify, Craine did not testify about the hallway remarks, and Gray did not address the office conversation in his brief testimony. I credit Tharp, Crouse, and Lofton.

(2) The bench view and its aftermath

The morning of the last day of the hearing Respondent pulled one of its beer trucks to the rear of the courthouse. The truck had four bays open on the driver's side. As photographs in evidence reflect, in the four bays on the driver's side Respondent had placed several items of beer bearing a label for each of the four drivers fired for old beer (R. Exh. 69). Hunt testified concerning these items.

Before Hunt testified, however, the parties and I went downstairs for a ''bench view'' of the items (17:2972–2973). Thereafter, Clayton Hunt, called by SDC, testified concerning the items.

Hunt testified that after he fired Lofton the beer was removed from Hunt's office and stored on skids in the warehouse vault where it remained until he supervised its loading onto the truck used for the bench view (17:2981–2984).[100]

On voir dire examination by the General Counsel, Hunt conceded that the bags also included old beer allegedly found on the routes after the discharge of the four (17:2983). During the Union's voir dire examination, Hunt admitted that warehouse employees work in the vault and he testified that if there were some 1985 cans included in the items for Lofton, then possibly their presence could be explained on the basis that the cans had been damaged and left in the truck by another driver (17:2984).[101]

During the bench view, and after the photographs were made which are in evidence, Lofton, designated as the Union's amanuensis for the bench view (17:2973),[102] under the observation of Supervisor Ross Miller, opened the plastic bags containing the items labeled as coming from his route. Lofton and Attorney Dixie began checking the items.

Later that morning the parties agreed that a joint inventory, showing code dates, would be prepared concerning the items seen during the bench view, and that the joint inventory would be submitted reasonably soon after the close of the hearing. Union Exhibit 33 was reserved as the exhibit number for the joint inventory (17:3000–3009). Alas, there is no joint inventory.

By date of 31 December 1985 the Union moved to reopen the record on the basis that it had been unable to arrange a joint inventory because of delays by SDC. The General Counsel joined by her own motion to reopen of the same date. In the Union's 31 December 1985 motion to reopen the record, Attorney Chris Dixie avers, in part (bracketed portions added):

> Notwithstanding the stipulation, Charging Parties have been unable to arrange with Respondent the preparation of the inventory. Further, they have been unable to obtain any explanation from Respondent's counsel of the reason for the extended delay.
>
> In this connection, undersigned counsel shows the Administrative Law Judge that he offered to make Howard Lofton available to meet any company representative to prepare jointly the inventory on Friday morning [6 December 1985] at 9:00 o'clock a.m., the first morning following the conclusion of the hearing. The offer was made by undersigned counsel to Ms. Carolyn Luedke. On that Friday, in a telephone call from undersigned counsel to Ms. Luedke, Ms. Luedke advised that Mr. Bambace would be going to the compound of Respondent over the weekend and would arrange for the joint inventory the following week. [The week of 9 December 1985.] During the following week, undersigned counsel called Ms. Luedke three times. One explanation given by Ms. Luedke was that she had been unable to ''catch'' Mr. Bambace. A second expla-

[98] Tharp testified that so far as he knows, owner Georges is Greek (3:657)

[99] This threat by Georges is not alleged in the complaint as being unlawful.

[100] As the photographs in evidence reflect, the items, sitting on skids, are stored in plastic bags.

[101] Hunt did not explain how 1985 cans could have gotten in the plastic bags.

[102] It turns out, apparently, that Attorney Dixie served as the amanuensis.

> nation was that delay had occurred because Mr. Bambace thought Ms. Luedke was taking care of the matter, while Ms. Luedke thought that Mr. Bambace was taking care of the matter. In the third conversation, Ms. Luedke advised that she would take the matter in hand and would contact undersigned counsel to conclude the arrangements. To this date, there has been no call back from any of Respondent's counsel. Undersigned counsel made one further unsuccessful effort to telephone Ms. Luedke and left a message with a secretary of her law firm that he was calling about the inventory in this case. No response followed.

On 14 January 1986 the Union served its supplemental motion to reopen the record. In its supplemental motion the Union stated that Attorney Luedke advised that someone had disposed of the beer items to be inventoried. The Union therefore moved that an attached affidavit, dated 12 January 1986, of Lofton be received into evidence.[103]

On 16 January 1986 Respondent submitted its reply (signed by Attorney Luedke) to the previous motions in which it opposed receiving Lofton's partial inventory. Paragraph 10 of Respondent's reply includes the following (numbers added):

> (1) The thrust of Counsel for the General Counsel's theory is not that the old beer was not found on the routes, but rather that the old beer found was used as a pretext to discharge the employees because of their union activities. (2) Thus, the old beer was displayed by Respondent merely to demonstrate physically the quantities of old beer found on these routes, not to buttress the testimony of the supervisors that the old beer was found.

The second point Respondent's counsel makes rather strangely disregards the last day testimony of Respondent's witness, Sales Manager Hunt, who described a chain of custody of the beer from his office at the discharges, to the vault, to the truck, and thence to the courthouse where we all viewed it. Thus, by Respondent's counsel Moore (17:2981–2982):

> Q. Mr. Hunt, you testified earlier in this proceeding about the reason for the termination of John Kimbrough, Raymond Rice, Sam Tharp, and Howard Lofton. When you met with those individuals and terminated them, did you have any beer in the office at the time?
>
> A. Yes, sir.
>
> Q. Where had that beer come from?
>
> A. Came out of their accounts.
>
> Q. Who had gotten them out of their accounts?
>
> A. Supervisors.
>
> Q. Did you show the employees the beer at the time of their termination interview?
>
> A. I said that was their beer that we got out of their accounts right there, and this was the papers that we had written them up on.
>
> Q. And what did you do with that beer afterwards?
>
> A. We, we took it and put it in the vault, and it was on a skid back there.
>
> . . . .
>
> Q. And did you ever move the beer out of the vault?
>
> A. No, sir.
>
> Q. So, until yesterday, the beer stayed in the vault?
>
> A. Yes, sir.
>
> Q. Now, did you supervise the loading of that beer onto the truck that we saw just a little while ago?
>
> A. Yes, sir.
>
> Q. When was that done?
>
> A. Yesterday.

On voir dire examination by Tamara Gant, one of the two counsel for the General Counsel, Hunt testified (17:2983):

> Q. Well, the beer you loaded yesterday, you supervised the loading of this beer on the truck.
>
> A. Yes, ma'am.
>
> Q. isn't that all the old beer you found on their routes both before and after they were discharged?
>
> A. Yes, ma'am.

The first point quoted earlier from Respondent's 16 January 1986 reply, to the effect that the General Counsel is contending only a pretext, disregards the question I raised at the hearing on this specific point. I inquired whether the General Counsel and the Union were contending that these items of beer were ''throw-down'' beer[104] planted in the stores by Respondent or its agents as, in effect, fraudulent evidence (15:2614).[105] The General Counsel and the Union appeared desirous of making both contentions.

Even so, the General Counsel stated (15:2615):

> MS. GANT: I might add, I think we believe there's probably substantial evidence that it may well have been throw down beer, in effect.

Although the General Counsel and the Union do argue selective enforcement, or pretext, in their posthearing briefs, they also contend that there was no old beer on the routes. The General Counsel, for example, asserts that the evidence ''strongly suggests'' that the beer was not found on Lofton's route (Br. at 92) and that the old beer ''*did not exist*.'' (Br. at 84.) Indeed, at page 145 of their brief, counsel for the General Counsel argue, ''Such alteration of records to 'create' old beer on the discriminatees' routes is further serious evidence of fraudulent concealment of the operative facts underlying these discharges.'' The briefs, of course, were filed after the motions to reopen the record were resolved.

Regarding the two points quoted earlier from the 16 January 1986 reply of Respondent's attorney, I consider Respond-

[103] These motions and other items are part of a package of documents, including the General Counsel's transmittal letter of 4 February 1986, in evidence as G.C. Exh. 67.

[104] The phrase ''throw-down'' derives from situations where a police officer carries a gun to throw down, or ''plant,'' at the scene of a confrontation between an officer and an arrestee. The planted weapon is relied on as justification for the force, even death, inflicted by an officer on the arrestee. See *Webster v. City of Houston*, 735 F.2d 838, 840, 843, 845–846 (5th Cir. 1984); *U.S. v. Mays*, 470 F.Supp. 642 (S.D.Tx. 1979).

[105] When I asked if a witness had suggested that the items were ''planted,'' Respondent's counsel explained that Lofton, at an unemployment compensation hearing before the Texas Employment Commission (TEC), had testified that he told Hunt (at the discharge, apparently) that the (old) beer was taken from the warehouse and planted on his route (15:2613–2614). Lofton confirms that he did so tell the TEC (11:2108–2109).

ent's two points to be unfortunate and disturbing, particularly the second one suggesting that the beer displayed at the bench view was merely illustrative and not the actual old beer found.[106]

In a conference call held 21 January 1986 I granted the motions to reopen the record to receive affidavits. Lofton's affidavit was in hand, and thereafter Respondent supplied an affidavit, dated 24 January, from Craine. Subsequent to that the parties signed a stipulation of six numbered paragraphs which I approved by order dated 13 February 1986 (G.C. Exh. 67).

The six points of the stipulation are that if called to the witness stand, (1) Attorney Dixie would testify that the assertions in his two motions to reopen are true and correct, (2) Lofton would do likewise regarding his 12 January 1986 affidavit, (3) Attorney Luedke would do the same on the factual assertions in Respondent's reply, (4) as would Craine concerning the contents of his affidavit of 24 January, (5) the documents make a composite exhibit, and (6) the stipulation may be received in evidence (G.C. Exh. 67). As noted, by my order of 13 February inscribed at the bottom of the stipulation, I approved the stipulation and received the stipulation and attachments in evidence. Because the General Counsel's transmittal letter of 4 February confirms the conference call date and specifies the exhibit number, I have included it as part of the package identified as General Council's Exhibit 67.

Craine, in his affidavit of 24 January 1986, explains things this way (emphasis added):

> On Thursday, December 5, 1985, I was present at the hearing before the National Labor Relations Board in the matter of Southwest Distributing Company, Inc. and Brewery, Soft Drink, Industrial and Allied Workers, Case Nos. 23–CA–9824–1 et al. A bench view of *old beer found on the routes* of Howard Lofton, Sam Tharp, Raymond Rice, and John Kimbrough was conducted, and we agreed to conduct a joint inventory of this beer following the hearing.
>
> The beer was brought to the Bob Casey Federal Building on a spare twelve bay delivery truck. since we did not anticipate needing the truck as of December 5, we planned to leave the beer on the truck until the joint inventory was conducted. Following the hearing, I directed supervisory officials, to remove the plastic bags which had covered the beer during transportation to the bench view and to stack the beer in an orderly fashion. The beer had previously been piled into the bays in a disorderly manner. In doing so, we discovered that the beer had somehow been mixed up among the various bays. For example, the ''Lofton bay'' contained beer found on the routes of Tharp and Kimbrough. The beer had been stored in the keg vault for over a year. It could have been moved and intermingled as employees moved kegs in and out of the keg vault. The beer remained on the truck until around December 27 or 28, 1985.
>
> At the end of December, we were having a promotion on Michelob Brands; that is, we were selling these brands at a discounted price. This fact plus the coming New Year's holiday caused us to sell more beer and to need the spare twelve bay truck for deliveries.
>
> I told the Warehouse Manager that we were through with it and he could use the truck for deliveries on the following Monday, December 30.
>
> On or about January 3, 1985, I talked to Carolyn Luedke, an attorney with Fulbright & Jaworski. Ms. Luedke wanted to make arrangements for the joint inventory. In attempting to do so, I discovered that the beer could not be located. On further investigation, I discovered that my statement that we were through with it, by which I had meant we were through with the truck, had been taken as an instruction that we were also through with the beer. Since the hearing was over, the beer had been inspected by TABC and disposal authorized, the beer was over a year old, and the Warehouse Manager misunderstood my statement to mean that we were through with the beer, it was disposed of by our usual procedure—pouring out the product and putting the cans in a large dumpster for pick up by a refuse collector. This occurred sometime over the weekend of December 27, 1985.
>
> When I discovered the above facts, I determined if we could retrieve the empty containers from the dumpster. However, the contents had already been picked up by the refuse collector.

Attached to Lofton's 12 January 1986 affidavit is a list of the items he inventoried. The list covers most of one page and includes mostly singles, with some six-packs, and a couple of cases of Michelob, Busch, Budweiser (Bud), and Bud Light. In his affidavit Lofton states:

> On Thursday, December 5, 1985, I accompanied the attorneys and Administrative Law Judge to view the Budweiser truck outside the Federal Building. I noticed that the Company had brought Truck No. 75, a twelve-bay truck. Four of the bays on the right-hand[107] side of the truck were opened to exhibit cans and bottles allegedly found on the routes of myself, Sam Tharp, Raymond Rice, and John Kimbrough. In each bay, the cans and bottles were in a cellophane sack, and the sacks were sealed with staples. There were painted signs in each bay designating the driver-salesmen involved in overage beer found on his route.
>
> During the exhibition, my attorney, Chris Dixie, and I examined each can or bottle which was located in the bay bearing my name. To examine these, I opened the cellophane container and picked up and looked at the code number on each item. My attorney stood by my side and wrote down the code date on each item as I called it out.
>
> As I called out each code date, I watched while my attorney wrote that date down on a yellow pad and looked carefully enough to see that the attorney was writing down the correct code date that I called out. Also, during this examination, Mr. Ross Miller stood immediately to my left and observed the process. As I examined each item and called out the code date, I ex-

[106] I am reminded of Hamlet's expression in act 3, scene 4, L. 81:

O shame, where is thy blush?

[107] Lofton's reference here to the ''right-hand side'' is in error. The bays opened were on the driver's side as reflected in the photographs in evidence as R. Exh. 68.

> hibited that item to Ross Miller who looked at it to see that the code date was correctly called out by me.
>
> Attached to this affidavit is the list of items examined and the code dates which they bore.
>
> After this examination, I put the items back in the cellophane bag in my bay.
>
> By the time Mr. Dixie and I had completed the examination of items in my bay, the party returned to the courtroom, so an item-by-item examination was not made of the materials in the bays of Tharp, Rice, and Kimbrough. I only had time to spot-check a couple of items in each of these bays.

There is a near total discrepancy between Lofton's inventory and Gay's reports. Thus, Gay reported finding two six-packs of out of date Bud Light in 12-ounce cans on 29 August 1984 at a U-Totem on Hollister (R. Exh. 41–42), yet Lofton's inventory contains only five cans (12-ounce, presumably) of Bud Liqht plus four 16-ounce cans of Bud Light.

Gay reported on 29 August that he found some old Michelob, one six-pack of Busch in 16-ounce cans, and some Bud Light at M-G Food on Fairbanks (R. Exh. 41–43), yet Lofton's inventory lists no 16-ounce cans of Busch. Indeed, all the Busch listed by Lofton is in bottles except for two cans bearing code dates for *1985.*

In Gay's third report for 29 August, he records finding three six-packs of out-of-date Busch in 12-ounce cans at Quick Check on Campbell (R. Exh. 41–44), yet, as seen above, the only cans of Busch listed by Lofton bear 1985 code dates.

Gay's 29 August report for M & M Food on Hollister records finding two six-packs of Bud Light plus one single of the same (R. Exh. 41–45), yet Lofton's inventory, as noted earlier regarding Gay's report concerning the U-Totem, lists only five 12-ounce singles of Bud Light plus four 16-ounce cans of Bud Light. Granting that four of the singles may have been in a six-pack container since they bear the same code date, the items listed are far fewer than the numerous Bud Liqht recorded in Gay's reports.

The General Counsel asserts that none of the code dates Gays recorded for the old beer he supposedly found on 29 August matches the code dates in Lofton's inventory (Br. at 144). She does not explain the process by which she arrives at that conclusion. Lofton's inventory, in three columns, lists the number of items, and the brand of beer followed by a column of five digits after each beer itemized. In some instances the digits could reflect a calendar date, but in others, such as 35783, it apparently would not. And Gay's reports are by code date by number, such as 131. The two lists are not converted to a common system which I can understand.

However, even without the benefit of a conversion to a common designation, it is very clear that the discrepancy between Gay's reports and Lofton's inventory is substantial. I do not credit Craine in his posttrial description of events. For example, I do not believe his assertion that the beer in the bays was ''intermingled'' beer.

At page 144 of their brief, counsel for the General Counsel request that I draw an adverse inference against Respondent from these circumstances. They do not suggest the specific nature of the inference which they request I make.

(3) Conclusions

Lofton testified with a sincere demeanor. At times he was offbase as to dates, but I generally credit the substance of his testimony.

By contrast, I do not credit Respondent's witnesses except where I make a specific finding on some point. I particularly do not believe President James Craine, Sales Manager Clayton Hunt, or Supervisor Robert Gay. Moreover, in drawing the strongest possible adverse inference from the circumstances surrounding the bench view and the destruction of the beer, I find as follows:

1. The beer displayed in the four bays of Respondent's truck during the bench view did *not* come off the routes of the four drivers, Lofton, Rice, Tharp, and Kimbrough as beer which went overage on their routes during their employment.
2. Following the bench view, and around mid-December 1985, Respondent deliberately destroyed the beer displayed at the bench view in order to prevent the parties from making the joint inventory agreed to on the last day of the hearing.
3. Respondent intentionally destroyed the bench view beer because a joint inventory would have revealed that the beer did *not* come from the routes of Lofton, Rice, Tharp, and Kimbrough as beer which went overage on their routes during their employment.
4. The beer displayed at Lofton's discharge interview did *not* come from Lofton's route.
5. The beer shown to Lofton on 30 August 1984 was throw-down beer planted by Respondent in the office to serve as a fraudulent basis for discharging Lofton.
6. Respondent considered Howard Lofton a troublemaker because of his union activities.
7. Respondent fired Lofton on 30 August 1984 because of his activities as chief steward for Teamsters Local 1111.
8. Respondent's deliberate destruction of the beer displayed at the bench view was a fraud on this proceeding and an abuse of the Board's processes.
9. After considering whether to strike all of Respondent's evidence on the overage beer issue, I have decided not to do so.

By discharging Howard Lofton on 30 August 1984, SDC, I find, violated Section 8(a)(3) of the Act. Accordingly, I shall order Respondent to offer him reinstatement and to make him whole, with interest.

c. *Raymond L. Rice*

(1) General facts

Hired about mid-August 1972, driver-salesman Raymond L. Rice had worked for SDC slightly over 12 years when Respondent fired him on 29 August 1984 (9:1690). At the time of Rice's discharge, Chris Garcia had been his supervisor for about 2 days (14:2365, Garcia). Before that, Rice was supervised by Mel Cook.

During his employment with SDC, Rice was active for the Union. In 1984 he was an assistant steward and served on the contract committee and the negotiating committee (9:1696, 1706). Rice did not sign either the petition to decer-

tify the Union (G.C. Exh. 2) or a union membership resignation letter (G.C. Exh. 16), and as previously summarized, Craine mentioned his name in that regard during July at the meetings of Respondent's managers. Recall also that in August, after the revised vote tally showed that the Union had lost the decertification election, President Craine, in a conversation with Sales Manager Crouse, named Rice as one of the ''troublemakers'' Respondent could proceed to eliminate (2:315–316).

About 7 a.m. Wednesday, 29 August, Rice was called to Hayes' office. Present were Hayes, Hunt, Garcia, and Rice (9:1700–1701). Hunt testified he informed Rice that old beer had been found on his route, that the old beer present in the office came from his route, and that Rice was terminated for having the old beer on his route (1:131; 17:2981). Garcia's version is consistent with Hunt's (14:2372–2373, 2425).

Rice testified that Hunt said he had lunched with Garcia the previous day, that after lunch they checked at a Save-On Liquor and, possibly, a 7-Eleven, and found out-of-date products. Hunt said he was disappointed because Rice had been a good driver-salesman over the years, but because of this old beer and things that had gone on in the past, Rice was terminated.[108] Hayes asked if the decision was final, and Hunt said, ''Yes. There's nothing I can do about it. That's orders from above.'' (9:1701, 1738–1739)

Garcia testified that Rice said nothing, and he denies that Hunt referred to ''other things.'' (14:2373) Hayes did not discuss this meeting when he testified. I credit Rice who impressed me as a witness.

Garcia testified that on 28 August Hunt arranged in advance to meet him for lunch (14:2412). Hunt met Garcia there to deliver to him a promotional packet for the 1985 Rodeo and Live Stock Show. Garcia does not know why Hunt did not give it to him that morning at the compound (14:2413–2414). As they left the restaurant, Hunt announced that he would accompany Garcia on his next calls.

Garcia and Hunt went to a nearby Save-On Liquor store at 9329 Katy Freeway where they found some old beer. At the 7-Eleven store, 819 Antoine, they found a case of old beer. Garcia identified the reports he prepared on the old beer found at these two stores. The reports were subsequently typed and are in evidence in duplicate (G.C. Exhs. 22–10, 12; R. Exhs. 40–6, 7).[109]

Hunt testified that the old beer found 28 August at the Save-On Liquor and at the 7-Eleven was what he relied on in discharging Rice, and that he fired Rice for having old beer on his route (1:95–98). Over the next couple of days after Rice's discharge Garcia continued to check stores on Rice's former route, found more old beer, and submitted additional reports covering it (G.C. Exh. 22–7, –8, –9). Hunt testified that the beer displayed under Rice's nametag at the bench view was that present in the office at the discharge plus the beer found on his route subsequent to his discharge but attributable to Rice (17:2981–2983).

Rice was off work from late October 1983 to about 1 April 1984 for medical reasons (9:1717, 1742). Charles C. Stone testified that he took over as driver of Rice's route in February 1984 and served as the driver until Rice returned when Stone converted to helper on the route (5:1038). Stone worked as Rice's helper until the end of May when Stone left SDC (5:1037; 6:1054).

About mid-April Rice reported old beer at the Save-On store in issue to Supervisor Mel Cook. Rice testified that he listed the items on a portion of a beer package called a ''beer flat,'' about the dimensions of a sheet of legal-size paper, and gave it to Cook in the presence of Stone (9:1691–1692, 1722–1727, 1742). Stone confirms this, although he does not mention the beer flap specifically (5:1045–1046). Cook denies receiving this report or any other from Rice about old beer at the Save-On store (15:2666, 2668, 2673).

Indeed, Supervisor Cook testified that he checked the rotation of the cold beer on the shelf and the gondola, although not the beer in the storeroom,[110] in that Save-On twice a month, yet he found no old beer before the route was assigned to Garcia (15:2676–2680).[111]

Stone testified that Rice had separated out the old beer at the Save-On and placed it in a hallway, but without tagging it ''old beer'' as he would have done (6:1068–1071, 1073). Rice testified he did not separate it and tag it because there was so much old beer it would have depleted the supply available for purchase (9:1729). He testified that he orally reminded Cook of the old beer at Save-On about mid-May and again about mid-June but that nothing was done about it (9:1728–1730, 1742). Cook testified that the beer sold slowly at that store (15:2680).

Stone testified that when he left SDC at the end of May there was no old beer, to the best of his knowledge, at any store on the route except for the old beer at the Save-On store (6:1057–1058).[112] When he left SDC, Stone testified, there were about five cases of old beer at Save-On (6:1068). Supervisor Cook testified that he even checked the storeroom at the 7-Eleven on Antoine and found no old beer at that store (15:2679).

Rice testified that he did not believe there could have been any old beer at the 7-Eleven on Antoine because the store had run out of beer for 2 straight weeks (9:1739).

Garcia's reports reflect that the old beer at Save-On had been out of date 131 days (one case), 110 days (two six-packs), 61 days (one case), and 6 days (two cases). At the 7-Eleven it was 1 case of two 12-pack cartons 26 and 36 days old. At the Pacific Super Market on Long Point (which Garcia checked on 29 August) a half-dozen brands, totaling over five cases, were out of date from a low of 100 days to a high of 155 days (G.C. Exh. 22–7). The two checks Garcia made on 30 August, at a U-Totem on Bunker Hill and a 7-Eleven on Westview, reflect product out of date from 7 to 276 days (G.C. Exh. 22–8, –9).

Rice testified that about 2 or 3 weeks after the decertification election he discovered that warehouse personnel (who load the trucks) had loaded six cases of completely out-of-date beer plus two cases of beer on the verge of being stale. All eight cases had been repackaged by warehouse personnel.

[108] Rice had never been disciplined previously in his 12 years at SDC (9:1703).

[109] The pages of R. Exh. 40 were not independently numbered at the hearing. I have numbered its seven pages as 1 through 7.

[110] Supervisor Garcia testified that he found the old beer in the cold box and in a display of hot beer (14:2415).

[111] Cook was uncertain when he was reassigned, dating it from 2 weeks to a month before Rice was fired (15:2674–2675, 2677). I find that he supervised Rice until Chris Garcia took over on Monday, 27 August.

[112] When asked about the other stores in which Garcia found old beer over 29–30 August, Stone said there was no old beer there when he left so far as he knew (6:1062–1063).

This was highly unusual.[113] Rice telephoned Cook who told him to bring the beer back in. When Rice returned he asked Warehouse Manager Donny Hollingsworth about the old beer. Hollingsworth asked if Price was being facetious. Rice said he was dead serious. Without answering, Hollingsworth turned and walked away (9:1696–1700, 1731–1733).

It appears that Hollingsworth was no longer employed at SDC at the time of the hearing. The parties stipulated that Hollingsworth was under subpoena from the General Counsel who did not call him to the witness stand (16:2752). I draw no inference from the General Counsel's failure to call Hollingsworth. It is possible to infer that Hollingsworth initially indicated a willingness to testify favorably to the General Counsel, but that he later had a ''sudden'' memory lapse and the General Counsel therefore did not call him as a witness. But that calls for speculation, so I draw no inference.

(2) Conclusions

At page 91 of their brief counsel for the General Counsel argue:

> The repeated reports of old beer at Save-On were not acted upon, thus leaving the beer there. A portion of this old beer became over-age because it was placed there with little shelf-life remaining, circumstances for which it was not Company policy to blame the employee. The old beer at 7-Eleven, if it existed, was clearly planted by Hunt, as neither Rice nor Cook could find any there. A few days before his discharge, Rice found large amounts of extremely old beer on his truck, for delivery, about which Warehouse Manager Hollingsworth acted suspiciously silent. When Rice failed to plant this old beer on his own route, Hunt himself did so and arranged to perform calls with the supervisor at the necessary stores. Not surprisingly, he then ''found'' the old beer.

In agreeing with the above assessment, and finding that Respondent (through Hunt in person or at his instruction) planted throw-down beer on Rice's route, I credit the testimony of Rice and Stone.[114] To the extent his testimony is consistent with the testimony of Rice, I credit Supervisor Cook. Where Garcia conflicts with Rice I do not credit Garcia. For the most part, Garcia seems to have been used by Hunt without Garcia's knowledge. I particularly do not believe Hunt, and I find that his ''orders from above'' were to get rid of Rice on the pretext of old beer.

As Hunt unwittingly confessed to Crouse at the Woodlands Country Club in late September or early October, old beer and improper rotation was the pretext he had used to earn owner Georges' crude expression of gratitude and admiration in implementing the order to eliminate those fired for that reason (2:317–319; 3:522).

Hunt did not specifically tell Crouse that Georges told him to get rid of those fired for old beer, but it is clear that the order emanated from owner Georges even if relayed through President Craine. Moreover, the order apparently included the old beer pretext, for when Crouse described that as a ludicrous excuse inasmuch as old beer could be found on any route, Hunt said, ''I did what I was told to do.'' (3:522)

Although I infer an unlawful motive from the foregoing,[115] Respondent's illegal motive is seen also in Craine's early August listing of Rice as one of the ''troublemakers'' that Respondent, now that the revised tally on the decertification election was final, could proceed to eliminate (2:316). As previously discussed, I have found that Craine used the term ''troublemakers'' as a shorthand expression of the animus he, and particularly owner Georges, held for hardcore union supporters.

Accordingly, I find that Respondent fired Raymond L. Rice for unlawful reasons, and I shall order Respondent to pay him backpay and to offer him reinstatement.

d. *Sammy L. Tharp*

(1) General facts

SDC hired Sammy L. Tharp in October 1977. On 3 May 1983 SDC fired Tharp, but Arbitrator John F. Caraway, in his award of 20 February 1984, directed SDC to reinstate Tharp without backpay (R. Exh. 10).[116] Tharp returned to work a few days later. Respondent fired him on 30 August 1984 for having (unreported) old beer on his route (3:559–560, 568, 594).

There appears to be no dispute that the day Tharp returned to work, about late February, his supervisor, John Roschal, covered with him his duties under Respondent's rules and policies (3:560, 581, 588; 14:2524–2525). Tharp testified that Roschal had him sign a memo to that effect, but there is no such memo in evidence bearing his signature.

There is a memo in evidence signed by Roschal (then) Sales Manager Dan Crouse, and (then) Brand Manager Clayton Hunt on this topic (G.C. Exh. 13), but Roschal testified that it was the subject of a second meeting of all four the same day (14:2526–2527). Tharp denies the group meeting (3:589). Neither Crouse nor Hunt was asked about this meeting in their testimony. I need not resolve the dispute about the second meeting.

According to Tharp, Roschall apparently the same day Sharp returned, told Tharp he should stay away from the Union and not get involved in union activities (3:562).[117] Tharp did not reply (3:657). Roschal did not address this allegation during his own testimony. I credit Tharp and find a violation as alleged.

On 24 May Craine gave Tharp a written reprimand (R. Exhs. 11, 59) for remarking (erroneously, according to the reprimand) to a customer about negotiations for a renewal collective-bargaining agreement (3:596–597; 16:2789–2796). Craine was not shown to have any personal knowledge about Tharp's alleged remarks, and no other witness established the facts of the incident. Tharp testified that Craine did not identify the customer and gave him no opportunity to reply. Tharp denies any such conversation with a customer, and he

[113] The repackaging was not unusual, but never before had Rice found beer so old in such quantity on his truck (9:1697, 1698).

[114] I also rely on the adverse inferences which I have drawn (as described earlier) from Respondent's destruction of the bench view beer.

[115] Thus, as I find the stated reason for the discharge to be false, I may, and do, infer that there is another reason—an unlawful motive, particularly since the surrounding facts tend to reinforce that inference. *Shattuck Denn Mining Corp.*, 362 F.2d 466, 470 (9th Cir. 1966).

[116] Tharp was a member of Local 1111 and had served on the Union's contract negotiating committee in 1981. He was not an officer in the Local, and he apparently was not a steward (3:562, 581).

[117] Roschal's alleged statement apparently is the subject of complaint par. 8.

thinks he filed a grievance over the warning although he is unsure (3:657–662).

Craine testified, without contradiction, that when the warning was raised by Lofton or Wells during the collective-bargaining agreement negotiations he explained the matter in detail, and he did not thereafter remove the warning from Tharp's file (16:2795). There is no complaint allegation regarding this written reprimand. I need not resolve the dispute about this item.

On 30 August Mark Horner escorted Tharp to the office of Bobby Hayes where Tharp was fired.[118] Present at the termination were Tharp, Horner, Hunt, and Hayes (3:569). Although Horner omits Hunt in naming the attendees (15:2566), Hunt testified that he was present and, confirming Tharp (3:570), explains that he discharged Tharp (1:88).[119]

Tharp testified that he and Horner were the first to arrive at Hayes' office, and not even Hunt was present at first. Tharp observed five cases of beer, in six-packs, stacked on the floor. Four of the cases were in one stack, and the fifth case off to the side had three six-packs in it. When Tharp inquired whether he was being fired for old beer, Horner said it looked that way. Answering Tharp's question of whether all the beer came off his route, Horner replied, ''No, just the three six-packs.'' (3:569, 642) Shortly thereafter Hunt and Hayes entered. Hayes sat at his desk and Hunt sat on a couch near the stack of beer.

Reading from a written statement, Hunt informed Tharp that he had old beer on his route at K & L Liquor, One Convenience, and Thunders Club (also known as Cartoons),[120] and that Tharp was terminated. Hunt said SDC could not tolerate this because it could cause owner Georges to lose the distributorship. Hayes asked if Tharp had any questions, and Tharp answered no. The meeting ended (3:570, 642).

During his own limited version of the discharge interview, Horner did not deny Tharp's version, including Tharp's description that Horner said the three six-packs were Tharp's and that Hunt pointed to, apparently, the same three six-packs (15:2566).

According to Tharp, as he and Horner walked back toward the salesroom he asked Horner what was really behind this. Horner replied that SDC was setting Tharp up from the day he returned after the arbitration when SDC had him sign the paper (3:570).[121] Horner denies this item. He testified that Tharp remarked he had been set up, and that he *made no reply* to Tharp (15:2567). Although I credit Horner on this point, I draw an adverse inference from his failure to deny Tharp's assertion that he had been set up. That is, I count Horner's silence as an admission that Tharp indeed was set up for discharge.[122]

Explaining that he relied on reports from Horner of old beer at five stores, Hunt testified that he terminated Tharp for that reason only, and he identified the five stores as a Safeway, K & L Liquor, Superway, One Convenience, and Cartoons (1:88–89).

As subsequently typed, Horner's reports are in evidence and reflect, in part, the following:

Exhibit	*Store*	*Date of Horner's call*	*Old beer*
R-42	Safeway 7645 Dashwood	24 August	two 6-packs
R-43	K & L Liquor 7323 Bellerine	29 August	three 6-packs
R-44	Superway 7640 Clarewood	29 August	three cases
R-45	One Convenience 5805 S. Gessner	29 August	equivalent of nearly four cases
R-46	Cartoons 3860 S. Gessner	29 August	one case

The staleness of the beer, according to Horner's testimony and his reports, is 16 days at the Safeway store; 24 days and 9 days at K & L Liquor; 36 days at Superway: 24, 24, and 112 at One Convenience, and 19 days at Cartoons.

Tharp testified that in late July he orally reported to Supervisor Roschal that there was old beer at K & L Liquor, at One Convenience, and that the Thunders Club[123] had closed with about 100 cases of beer that would be going out of date very soon (3:566–567, 602–603, 611–613). When Horner took over about mid-August, Tharp also reported the old beer at these three stores to him (3:567, 602, 613). Tharp testified he could not recall whether he reported any old beer at the Safeway, the Superway, or some three other stores Horner identified in his testimony as places where he, on 11 September, found old beer attributable to Tharp (3:603, 621–622, 651). On an average day Tharp delivered beer at some 40 stores or about 200 stops a week (3:650).

Roschal denies that Tharp reported any old beer to him (14:2531–2532). Roschal testified that beginning at least as early as 1983 he explained over and over to Tharp that oral reports of old beer were unacceptable, that he had to fill out the proper reporting form (14:2530–2531). Horner testified that drivers are to report old beer only in writing on the proper form, and that he has never accepted an oral report and filled out the form himself (15:2552–2553, 2580, 2608). He testified that Tharp never submitted a written report of the old beer Horner found at the stores (15:2566).

Horner testified that on 25 August, the day he found the old beer at Safeway on Dashwood, he orally warned Tharp that he must clean up his route. Indeed, Horner testified, the first day he became Tharp's supervisor he told him that they were to clean up the market (15:2558, 2576).

(2) Conclusions

Respondent certainly felt animus toward Tharp over the Union's successful effort to get him reinstated through arbitration. Owner Georges was furious, confronted Tharp, cursed him, repeated the name-calling in a meeting with

[118] Horner had replaced Roschal as Tharp's supervisor about 2 weeks earlier (3:566; 15:2547–2548, 2594).

[119] Horner testified that Hayes did the discharging (15:2566). When he testified, Hayes did not address this topic.

[120] Tharp testified that Hunt pointed to the beer found on Tharp's route (3:642). Presumably Hunt pointed at the three six-packs since that is what Hunt moments before had identified as coming from Tharp's route.

[121] Complaint pars. 23(a) and (b). The General Counsel argues that such a statement is illegal because it indicates punishment for exercising statutory rights (Br. at 98–99).

[122] I nevertheless shall dismiss complaint pars. 23(a) and (b) since they focus on the arbitration.

[123] Tharp testified that the Thunders Club and Cartoons are one and the same (3:604).

Tharp and Lofton minutes later, and concluded that meeting by threatening to fire them both if they made a single mistake.

Even if I were to find that Craine's 24 May reprimand of Tharp was prompted in fact by a complaint by a customer, that would not require a finding that owner Georges, by not firing Tharp then, no longer harbored animus toward Tharp. In the circumstances of this case, I would find that cooler heads prevailed on Georges to adopt a more patient and sophisticated approach by giving Tharp a written warning that termination could be next.

Regardless of whether I credit Tharp's testimony that in late July he informed Roschal of the old beer at K & L Liquor, One Convenience, and Thunders Club (Cartoons), even by Horner's records nearly all of it was removed. Thus, of the three stores Tharp says Hunt named, none of the items at K & L Liquor or Thunders Club (Cartoons) was old enough to reach back into July. At One Convenience only one of three items was old enough—Bud Light, 3/4 case, 112 days old (R. Exh. 45).[124]

Crediting Tharp in his account of the discharge interview,[125] I find that Hunt specified those three stores. I therefore find that Respondent fired Tharp for three six-packs which it claims was old beer purportedly removed from Tharp's route.

Although Hunt read from a prepared statement in discharging Tharp, we do not have the benefit of that statement in evidence.

It is useless to attempt to find the three six-packs in Horner's reports. In the first place I do not credit Horner's testimony regarding the old beer he supposedly found, and I therefore do not credit his ''reports'' which are in evidence.

The unreliable nature of Respondent's old beer reports, as so disturbingly highlighted by Respondent's deliberate destruction of the beer displayed at the bench view, further persuades me that none of the reports submitted by Horner can be trusted. Indeed, as with Lofton and Rice, I find that the beer displayed for Tharp was throw-down beer planted by Respondent to serve as a fraudulent basis for discharging Tharp because of his union activities, including his successful effort to gain reinstatement through arbitration.

The General Counsel presented a prima facie case that Respondent was motivated by unlawful animus in firing Tharp, and Respondent has failed to show that it would have fired him notwithstanding that animus.

Accordingly, I shall order Respondent to reinstate Tharp and to pay him backpay.[126]

e. *Walter John Kimbrough*

(1) General facts

Walter John Kimbrough worked l3 years for SDC, from May 1971 to his discharge on 11 September 1984 (10:1803–1804). A union member on dues checkoff, Kimbrough was a member of the Union's negotiating committee about 6 years ago (10:1804). He never signed a union membership resignation letter (G.C. Exh. 15). In forceful language Kimbrough denied Ross Miller's inquiry, the second week of June, whether he wanted to sign the decertification petition (10:1806–1807).

Kimbrough injured his back while delivering beer on 29 August and was off work thereafter (10:1807, 1854). He was at home from his injury when Sales Manager Clayton Hunt telephoned him about midmorning on 11 September and, Kimbrough testified, told him he was terminated for old beer and ''others'' (10:1810, 1854; R. Exh. 28 at 2). When Kimbrough asked what the ''others'' were, Hunt asked if he wanted to talk to Supervisor William T. Spears about that. Kimbrough said he wanted to hear from Hunt. Sales Manager Hunt said that neither Kimbrough nor SDC owed the other anything, and if Kimbrough had any further questions he should talk to Bob Toombs. Immediately thereafter Kimbrough called and asked Assistant Controller Bob Toombs, but Toombs said he knew nothing about it (10:1811–1812). Toombs did not testify.

Hunt testified that he fired Kimbrough for (1) having old beer on his route and (2) drinking on the job, and that for both grounds he relied on reports submitted by Supervisor Spears plus prior reports contained in Kimbrough's personnel file (1:80–85). Hunt testified the file also reflected that on 2 August Supervisor John Platt warned Kimbrough not to drink at a customer's location on driver Kimbrough's route (1:85–86). Other than Platt's memo, Hunt conceded that there was nothing in the file indicating Kimbrough was warned that his job was in jeopardy if he did not correct his drinking habits (1:86, 87), and Kimbrough testified that he was never warned to that effect or told that drinking at all on the route was a dischargeable offense (10:1813, 1818, 1930). Even when he was suspended 3 days in about March 1984 for having an open can of beer in his vehicle on his route he was not told, Kimbrough testified, that another offense would be cause for discharge (10:1813, 1931).

Under Respondent's 1981 rules,[127] rule 18 provided, in part, ''This company will not permit intoxication while on duty or the carrying, or use of any drugs or hard liquor. (Doctor's prescription exception.)''

Respondent's rule changed with the new rules implemented on 1 June 1984. Thus. rule 2 provides (G.C. 18 at 26; R. Exh. 7):

> Reporting to work or working under the influence of, or consuming on or off the premises of the company, or bringing into a warehouse or plant at any time, whether on duty or not, any form of alcoholic beverage or intoxicating or hallucenogenic drug or substance is prohibited.

The penalty specified for a first offense violation is discharge.

Rule 2 will receive no prizes for clarity of thought or precision of expression. Aside from the question of whether ''under the influence'' is a more restrictive standard for employees than the ''intoxication'' of old rule 18, new rule 2 addresses, in part, the matter of consuming alcoholic beverages while off company premises. Presumably the drafter

[124] A listing of ''3/4 case of cans,'' as at One Convenience, is the equivalent in amount to three six-packs, but it is not the same as beer packaged in six-packs.

[125] I also credit Tharp that in his conversation with Horner in Hayes' office Horner said that only the three six-packs came from Tharp's route.

[126] In reading the arbitrator's decision, and acknowledging Crouse's low opinion of Tharp's performance, one might conclude that Tharp is less than a model employee. But Respondent fired Tharp on the sole ground of old beer. Its evidence as to this ground was wholly unreliable.

[127] Issued by President John P. Fauntleroy on 1 July 1981 (U. Exh. 4).

meant to prohibit, among other conduct, working ''under the influence'' or drinking while on duty. Unfortunately, the language would prohibit an employee from drinking beer in the privacy of his home while off duty. There is no evidence that Respondent ever clarified this garbled rule by any notice or announcement to its employees as to how the rule should be interpreted,[128] nor is there any evidence that Respondent, even after the decertification election, issued a modified rule using plain English.

To the extent rule 2 addresses drinking while on SDC's premises, even when off duty, Respondent itself violated the rule when it threw a party for unit employees in its hospitality room to celebrate the announcement of the Region's certification of results.[129] On that occasion free beer was served to the drivers as they came in from their routes.

Kimbrough testified that Kevin Tully was his supervisor for about the first 7 months of 1984 (10:1815). He also testified that over the years Tully and several other supervisors and managers had bought him beers many times while they both were on duty (10:1814–1816, 1901). The last such occasion, Kimbrough testified, involved his new supervisor, William T. Spears. As Kimbrough describes it, about 1 August Spears bought Kimbrough and his helper, Barry Bittner, each a beer at Dalton's Saloon on Dairy Ashford, and Spears consumed one with them (10:l817, 1874).

Spears not only denies that testimony (15:2638), but asserts, without contradiction when Kimbrough appeared as a rebuttal witness, that on 29 August he observed Kimbrough order a beer at Dalton's then Kimbrough made a delivery stop there. Spears was there to arrange a promotion with the manager and Kimbrough did not see Spears when Kimbrough entered (15:2634-2635).

Spears also was drinking a beer that day at Dalton's. He explained to Kimbrough that he was there to arrange a promotion. He said nothing about the drinking to Kimbrough then because there were bar customers present, but he did tell Kimbrough that he would see him in the morning. Spears testified that although company policy forbids drinking on the job under pain of dismissal, that policy does not apply to supervisors who drive their personal cars. Spears was driving his personal car that day (15:2635, 2642–2643).

There is no other evidence that Respondent had a different set of rules for its supervisors as far as drinking off premises while on duty is concerned. Under general tort law it would make no difference, on the issue of liability, whether a third person was run over by an ''under the influence'' driver in a beer truck or by a supervisor, in like condition, driving his personal car on company business. From a public relations standpoint a distinction can be made between a personal car and a well identified company beer truck, and perhaps SDC makes that distinction in its policies.

Whatever Respondent's policy is for supervisors, Spears prepared a memo that day covering his observations at Dalton's, and he submitted the memo to Sales Manager Hunt on 30 August when Kimbrough, because of his injury the late afternoon of 29 August, did not come to work (15:2626–2638). The memo covers the essentials described by Spears at the hearing (G.C. Exh. 20 at 6).

John Platt testified that on 2 August, when his normal classification was merchandiser, he served as acting supervisor in the absence of the vacationing Kevin Tully (15:2658–2659). About 12:30 p.m. that day Platt entered the Gessner Inn Club and observed Kimbrough and helper Barry Bittner at the bar drinking beer. After speaking with the manager about business, Platt, on his way out, told Kimbrough that he should not drink any more beer because Kimbrough was driving a company vehicle (15:2660). In the memo he prepared on the subject Platt states he told both ''not to sit here and drink.'' (G.C. Exh. 20 at 7.)

Platt testified that he gave the memo to Tully when the latter returned a few days later, ''less than a week.'' (15:2660) As 2 August was a Thursday, Tully apparently returned to work Monday, 6 August.

Although Kimbrough denies that the incident occurred, he concedes that he occasionally consumes a beer at the Gessner Inn Club, and that Platt has come in there (on other occasions, apparently) while Kimbrough was servicing the account (10:1880–1882). Bittner did not testify. I credit Platt.

General Counsel's Exhibit 20 contains several copies of items drawn from Kimbrough's personnel file. Several items appear to be handwritten memos by Supervisor Tully concerning unsatisfactory performance of Kimbrough related to drinking, old beer, and customer relations. The memos range in date from January to mid-July 1984.

Former Sales Manager Crouse testified that he thought Kimbrough was an alcoholic, that Kimbrough rebuffed his suggestion that he seek treatment at the expense of either ABI or the Union, and that in the spring of 1984 Craine rejected his effort to fire Kimbrough on the ground that there was insufficient documentation to support a discharge (2:324, 356; 3:487–490).[130] Hayes also testified that about mid-May he unsuccessfully tried to persuade Kimbrough to enter a rehabilitation program if he had a drinking problem, but that Kimbrough responded, ''I don't have a problem.'' (16:2867–2868)

Denying that Crouse or Hayes ever talked to him about seeking treatment for alcoholism, Kimbrough testified that he does not have a drinking problem (17:3036–3037). Throughout his testimony Kimbrough conceded that several supervisors and managers from time to time would tell him to watch his drinking, but that always it would be in a context that all drivers should be cautious concerning their drinking.

Kimbrough admits that periodically during 1984 he would drink one to three beers while making his route, but never more than four beers (10:1900–1901).

Evidence regarding the old beer appears in Hunt's limited testimony (1:82–84), and by stipulation that Spears would testify that he did find on Kimbrough's route the items specified in certain reports (15:2621–2626; R. Exhs. 50–55). Some of the reports are based on calls made following Kimbrough's discharge but, because of the extended overage, supposedly attributable to Kimbrough. On the post discharge reports as to Kimbrough, as well as to the other affected dis-

[128] Although the Union read rule 2 and all the others at the ratification meeting on 31 May, and Crouse, according to Kimbrough, did so later (10:1840–1841), the rule itself, without clarification or interpretation, is overly broad and confusing.

[129] The new rules do not have a counterpart to old rule 39 which provided (U. Exh. 4):

> There shall be no drinking of alcoholic beverages on the company premises except when the company has an authorized function where beer is served.

[130] Craine testified that he attempts to review all disciplinary actions (2:182). He apparently does review all discharges (2:210).

chargees, I received them over the General Counsel's objection solely as an aid in resolving credibility concerning the overage beer allegedly found before the discharge.

The old beer Spears purportedly found before Kimbrough was fired included three different U-Totems visited on 29 August (R. Exh. 50). Two cans of Budweiser were found at U-Totem, 12420 Memorial, 41 and 77 days overage; 21 cans of Bud and Bud Light plus 2.5 cases of 16-ounce cans of Bud Light were found at U-Totem, 950 Tulley, with the cans ranging from 79 days to 246 days overage and the 2.5 cases being 69 days out of date; and two 16-ounce cans of Bud Light were found at U-Totem, 14344 Memorial. A final report in this series is either stale itself or garbled, for it shows the date of call as ''January 24, 1984.'' Although the report bears the same signature date as the previous ones, 11 September, it reflects that Spears ''made account with Kevin Tulley.'' A total of nine cases were found, with the overage dates not stated.

A second set of reports covers two stores visited on 10 September, Greener Fields on T & C Lane and Walgreens on Town and Country (R. Exh. 51). At Greener Fields Spears found three six-packs of Michelob Light ''Nrs'' 210 days old, and at Walgreens two cases of Michelob 7-ounce ''Nrs'' 241 days old plus one can of Budweiser 53 days overage. The abbreviation ''Nrs'' means nonreturnable bottles (15:2560).

Next come the post discharge discoveries of overage and unrotated product on 12 September at two Stop-N-Gos,[131] a Midget Market,[132] a Pick-N-Pack,[133] and the Shadow Oaks Drive-In[134] (R. Exhs. 52–56).

As the General Counsel points out in her brief (at appendix A), *none* of this old beer, not one can, whether purportedly found before Kimbrough's discharge or after, is the subject of any of the many reports Respondent began making about that time to the TABC. Nor is any of this old beer reported on expense accounts as having been purchased at retail and discarded.

Kimbrough testified that, about a month before he was injured, Supervisor Kevin Tully[135] checked his route and told him the route was clean (10:1809–1810). Tully did not testify. According to Supervisor Chris Garcia, Tully had moved to St. Louis by the time of the hearing (14:2402).

According to Spears, in late July he found a few cans of old beer at three locations (Cobweb Liquor, Bigwig Liquor, and a 7-Eleven) on Kimbrough's route, that he purchased them, discarded them, told Kimbrough about it, instructed him to clean up his route, to document the old beer, and to submit the old beer reports to Spears so action could be taken to remove the overage beer (15:2640–2642).[136] Although Kimbrough was not asked about this, I specifically do not credit Spears on this point. He testified very unpersuasively on this item.

Kimbrough testified that to his knowledge there was no overage beer on his route as of 29 August, the date he was injured (10:1809, 1858). Respecting the old beer point, I credit Kimbrough. I therefore find that Tully pronounced Kimbrough's route clean in late July, that it was clean on 29 August, and that Spear's overage beer reports are nothing but fraudulent fabrications.

(2) Conclusions

Respondent first argues that the complaint should be dismissed as to Kimbrough because the General Counsel failed to establish a prima facie case (Br. at 170, 174, 185). That raises the question of whether, in determining if a prima facie case was established, I must consider only the evidence adduced during the cases-in-chief of the General Counsel and the Union, or whether I am to weigh all the evidence in the record.

In *Hillside Bus Corp.*, 262 NLRB 1254 (1982), the administrative law judge assessed all the record evidence to determine whether the General Counsel had established a prima facie case.[137] Relying on the allocation of burdens it announced in *Wright Line*, 251 NLRB 1083 (1980), the Board, in *Hillside*, held that the administrative law judge erred by not weighing the General Counsel's evidence in isolation from that presented after the General Counsel rested his case-in-chief.

Compare, however, *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 31 FEP Cases 609 (1983).[138] In *Aikens* the Supreme Court held that where a case is tried in full on the merits, whether the plaintiff made out a prima facie case ''is no longer relevant,'' and the trier of facts should proceed to decide the case on the merits.

Even if it can be said that Section 102.41[139] of the Board's Rules and Regulations can be interpreted differently from FRCP 41(b)[140] (the former speaks of not waiving the motion whereas the latter simply provides that the right to present evidence will not be waived by making the motion, here SDC made no motion to dismiss when the General Counsel and the Union rested their cases-in-chief.[141]

Under the rationale of *Aikens*, did Respondent, by failing to make a motion to dismiss, waive its right to insist that, in determining whether a prima facie case was established, I disregard all evidence adduced after the General Counsel and the Union rested their cases-in-chief? If so then I am at liberty to consider all the evidence of record, including the

[131] Other than one can 7 days old, the next range from 18 to 169 days old.

[132] From 31 to 248 days overage.

[133] From 18 to 83 days overage.

[134] Where ''416 cans'' of Michelob were 60 days out of date.

[135] At p. 108 of their brief, counsel for General Counsel observe that the transcript has an answer missing which would appear at the top of 10:1810, and they assert that the answer would be the name of Supervisor Kevin Tully. Thus, at 10:1809, L. 25 the question asked is, ''Okay. And what supervisor was that?'' L. 25 being the last numbered line, the answer should appear, but does not, at the top of 10:1810. Instead, a new question appears. My notes reflect that Kimbrough answered Kevin Tully. By letter of 6 June 1986 to me, copies to all counsel, the court reporter confirms the answer was ''Kevin Tully.''I hereby correct the record accordingly.

[136] The record fails to reflect precisely when Tully ceased being Kimbrough's supervisor, and it is not clear exactly when Spears took charge.

[137] The respondent in *Hillside* apparently failed to make a motion to dismiss when the General Counsel rested his case-in-chief.

[138] In *Aikens* the Postal Service moved, at the close of the plaintiff's case, to dismiss on the ground that no prima facie case was established. In a bench trial, the district court denied the motion. 460 U.S. at 714 fn. 4.

[139] ''Any objection . . . . No such objection shall be deemed waived by further participation in the hearing.''

[140] FRCP 41(b) reads, in part, ''After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.''

[141] In *Esco Elevators*, 271 NLRB 1261, 1267–1268 (1984), the respondent preserved its position by making such a motion.

testimony of Hunt regarding the beer displayed for the bench view and the strong adverse inference I have drawn from Respondent's subsequent destruction of the bench view beer.

Although *Aikens* does not expressly apply to Board proceedings, its rationale appears to do so. Nevertheless, in absence of clarification by the Board, I shall follow *Hillside*. Accordingly, in determining whether a prima facie case was established regarding Kimbrough, I shall weigh only that evidence adduced as of the time the General Counsel (13:2341) and the Union (13:2339) rested their cases-in-chief.

Kimbrough was named on Hayes' ''hit list'' well before he declined Ross Miller's request to sign the decertification petition, and in the spring of 1984 Craine rejected Crouse's request to fire Kimbrough only because Craine considered the documentation insufficient.[142]

Crouse testified he knew of no correlation between the ''hit list'' names, which included both union and nonunion employees, and the scorecard Craine maintained for purposes of the decertification election (2:351).

In these circumstances, that Craine named Kimbrough in August as one of the ''troublemakers'' Respondent could now proceed to discharge is just as consistent with a view that Craine wanted to fire him for lawful reasons as it is with a theory that Craine wanted to eliminate Kimbrough because he refused to sign the decertification petition or resign his union membership.

I now consider the discharge reasons which Hunt announced to Kimbrough, as further described by Hunt when the General Counsel called him as an adverse witness. I have found the overage beer ground to be a fraudulent fabrication. From that finding, I infer that Respondent's real motive was the unlawful one of wanting to eliminate Kimbrough because he was unwilling to support the decertification movement. Thus, the General Counsel established a prima facie case of unlawful discharge as to Kimbrough.

Considering all the evidence, I credit Supervisor Spears' uncontradicted testimony that on 29 August he observed Kimbrough and his helper drinking beer at Dalton's while they were on duty. For this drinking episode, including a warning on 2 August by Acting Supervisor Platt, Respondent fired Kimbrough.

Has Respondent shown that it would have fired Kimbrough for the drinking at Dalton's even if Kimbrough had signed the decertification petition and submitted a union membership resignation letter? I think not. Respondent violated its own new rule 2 by the beer party it lavished on drivers the afternoon of 13 August at SDC's hospitality room. Moreover, Respondent never saw fit to clarify the garbled and nonsensical rule 2. In light of these facts, plus Respondent's past history (before 1 June 1984) of supervisors and managers consuming beer with Kimbrough at customer stops on his route, Respondent's evidence falls short of overcoming the General Counsel's prima facie case.

To the extent Respondent, during its case-in-chief, introduced additional evidence regarding overage beer, I find that as unpersuasive as the other.

Accordingly, I shall order Respondent to offer Kimbrough reinstatement and to make him whole.

[142] Craine perhaps was thinking of the documentation necessary to satisfy the ''good and sufficient cause'' standard provided in art. 1, sec. 6(a) of the 1981–1984 collective-bargaining agreement (U. Exh. 32).

f. *Fred Holliday*

(1) General facts

Employed by SDC for nearly 17 years, from 11 November 1967 to 10 September 1984, Fred Holliday was a driver-salesman on route 7 when he left Respondent's employment. While at SDC, Holliday was on dues checkoff, and he served on the Union's 1984 negotiating committee (8:1576–1577; 9:1598, 1601).

The ultimate question is whether Fred Holliday quit or whether SDC fired him. At the hearing counsel for the General Counsel took the position that Holliday's termination was a plain discharge and that the General Counsel was not contending it was a constructive discharge (9:1633). Not mentioning plain discharge in their brief, counsel for the General Counsel argue that the circumstances reflect a constructive discharge (Br. at 104–105).

Earlier I found that in a meeting about 24 August Hayes unlawfully threatened four employees, Fred Holliday in particular, by telling them that owner Georges said there was no more union, no need for any union stewards, and that henceforth Fred Holliday and the others should be seeking employment elsewhere. Hayes labeled Holliday as the ringleader.

In a separate meeting which followed with Holliday, Gray confirmed that owner Basil Georges was upset about Fred Holliday's acting as a leader of the blacks. As I found, Georges equated Fred Holliday's concerted action among the blacks in support of dischargee Louis Riley (and, as a secondary consequence, activity in mutual support of themselves), with the type of function a union steward would perform. Considered together, the remarks of Hayes and Gray reflect hostility by Basil Georges toward anyone assuming any role suggesting union leadership. Indeed, the message from Georges was clear—if Fred Holliday, and the others as well, wanted a union or desired to carry on the concerted ''preaching'' of a union steward, then go find a job where there is a union. The ultimate message is an implied threat of discharge if they fail to heed the warning.

A. J. Montalbano was Holliday's supervisor. During August–September 1984, Holliday testified, Montalbano was off work because of illness. Before his illness, Montalbano periodically would check rotation of the beer at stores on Fred Holliday's route (9:1598–1599). Sometime in the fall, perhaps late September 1984, Montalbano died from his cancer illness (3:426–427; 9:1600; 15:2690).

During Montalbano's absence from terminal cancer, other supervisors substituted for him, Holliday testified (9:1599). William Jordan was one of the supervisors who helped share the responsibility of filling in for Montalbano (15:2691). At Hunt's request, Jordan assisted Ross Miller in substituting for Montalbano on route 7 (Fred Holliday) the first week of September (15:2691–2695, 2702).[143] Actually, Jordan checked the route just 1 day with Miller that week (15:2707). Leaving around 9:30 to 10 a.m., they drove in Miller's car (15:2702).

Jordan testified that on this one day (not specifically dated by Jordan) he and Miller went to check on a complaint from

[143] Promoted to supervisor on 1 September, Miller's position was both unprecedented with SDC and unique. In his new position, Miller was a route supervisor over all routes although he was not supervisor to the other route supervisors. Primarily he handled driver training in customer relations (5:842, 886–889). Jordan had been a supervisor for 8 years as of the hearing, or about 7 years as of September 1984 (15:2689).

Spec's Liquor. Jordan could not remember the nature of the complaint (15:2692). From Spec's he and Miller checked the rotation of beer in at least 10 stores on Fred Holliday's route 7, finding about a six-pack and a couple of cans of overage beer which they purchased. As he was assisting Miller, Jordan did not report the old beer, and he does not know whether Miller did (15:2693–2696, 2702).

According to Jordan, he and Miller were working *behind* Fred Holliday, that is, reaching stores Holliday had just serviced. Jordan would identify himself, leave his card, and ask permission to fill the cooler. He would not say why he was there,[144] and he did not tell the owner that he was checking on Fred Holliday (15:2703–2705). Ross Miller did not address the subject of his and Jordan's coverage of route 7 on the matters described by Jordan.

Fred Holliday testified that on Friday, 7 September, he learned from the customers that Miller and Jordan were checking his route because they were working *ahead* of him, including some stores where he was not scheduled to deliver until the next day, and leaving their cards. This struck Holliday as a conniving effort by SDC to find something wrong on his route (8:1583; 9:1609–1611).

After learning of this, Holliday, that 7 September, telephoned Executive Vice President Hayes and asked why SDC was engaging in the underhanded tactic of sending Supervisors Miller and Jordan to check his route for old beer. Asking who the hell told Holliday that, Hayes, without waiting for an answer, immediately hung up the telephone (8:1584; 9:1609, 1611). Hayes did not cover this in his testimony.

When Holliday reported for work the early morning of Monday, 10 September, dispatcher Jim Schicker asked Holliday whether he was going to pull his route. Immediately Holliday thought he was going to be fired. Holliday answered that so far as he knew he was planning on delivering the route. Schicker told Holliday that Hayes wanted to see him in his office (8:1584–1585, 9:1513).

Holliday reported to Hayes as instructed. Hayes began by saying he was writing down everything Holliday said. He told Holliday that SDC had the right to do whatever it pleases when it pleases, and that he considered Holliday's telephone call the previous Friday, 7 September, to be a threat. Holliday said that all he wanted was SDC's cooperation. Hayes suggested that Holliday read the rules and regulations and know them as well as he did the contract and everything would be fine. Holliday answered that he did know the rules and regulations. Then go back to your job and go to work, Hayes replied (8:1585–1586; 9:1615–1616).

Employed with SDC since February 1984, Dennis Powers was a merchandiser until his promotion to route supervisor 1 October 1985 (not 1984) (following the death of Montalbano (15:2710, 2728–2729).[145] In September 1984 Powers served as acting supervisor over Montalbano's routes, including Fred Holliday's route 7 (15:27111, 2728–2729).

Powers testified that the early morning of Monday, 10 September, dispatcher Schicker told him that Fred Holliday said he was not going to pull route 7. Powers went to the salesroom, found Holliday, and asked him about it. According to Powers, Holliday first said he was not going to work. As the helper, Jim Ornalik, was on vacation, Powers asked Holliday if he would pull the route that day. Holliday said he would pull the route that day but he was going to quit after that. Powers reported these developments to Hunt who, in turn, contacted Hayes. They asked Powers to doublecheck on whether Holliday was going to quit (15:2712–2714, 2747).

Proceeding to the route, Powers found Fred Holliday at Spec's Liquor Warehouse and asked if Holliday was sure he was quitting that day, for if he was, Powers needed to contact helper Ornalik who knew the route. Holliday said he was quitting, that he could not take the pressure any longer, that Supervisors Ross Miller and William Jordan had been on his route checking, and that this was his last day. Powers said he knew nothing about Miller and Jordan checking his route. They shook hands, Powers said it had been good working with him, he wished Holliday luck, and said he would see him later. Powers expressed no regrets that Holliday was quitting because ''I hardly knew the man.'' (15:2714–2715, 2749, 2752–2753.) Powers returned to the office, or telephoned Hunt, and reported that this was Holliday's last day because he was quitting (15:2715, 2754).

Fred Holliday testified that on 10 September Powers approached him at the first stop, Spec's Liquor Warehouse, said he was sorry for what had happened that day, that Holliday was his best driver because his was the cleanest route Powers had. They discussed what had been said that morning in Hayes' office. He asked if Holliday was going to quit, and Holliday answered that he had not really planned on it, but because of the pressure he was under he would let Powers know at the end of the week (8:1586; 9:1614–1618).

Holliday denies that earlier that morning he told Powers he was not going to pull the route, and denies mentioning Ross and Jordan by name to Powers at Spec's Liquor Warehouse, although he testified it did come up that someone had been out checking on his route (9:1614, 1617–1618).

For his part, Powers testified that he was not aware of what had transpired that morning between Holliday and his supervisors, he denies saying he regretted what had happened in the office between Holliday and *Hunt*, denies any awareness that Holliday had telephoned SDC seeking an explanation of why Miller and Jordan were checking his route, and testified that he knew none of that until Holliday informed him that morning at Spec's Warehouse (15:2747–2748).

Although he did find route 7 to be clean (that is, no overage beer), Powers testified that he did not tell Holliday that he had one of the cleanest routes (15:2751–2752).

On returning to the plant on Monday, 10 September, after completing his route, Holliday was called into Hunt's office. Present were Hunt, Hayes, and Fred Holliday; Remarking that they heard Holliday was going to resign, Hayes said they had his checks prepared. As he said this, Hayes handed Holliday his two final paychecks.[146] Hayes said they would be glad to help Holliday find a job (8:1587; 9:1618–1619).

Holliday admits that all he said was ''Okay'' (8:1587; 9:1619). He did not object because he felt he was going to be fired anyway and he had no power to resist (8:1588). To

[144] I credit Chau Nguyen, manager of a Circle K on the route, that about this time Jordan in fact came in, said he was checking for old beer, and purchased a six-pack plus two or three cans (10:1968, 1978).

[145] Powers' dates suggest that Montalbano was off work over a year before he died.

[146] Because of loan repayments, the checks were for $1 each (8:1587; 9:1620).

Holliday the two checks were proof that he was fired (9:1619). He felt he had no choice but to accept the checks and leave. Moreover, Chief Steward Lofton earlier had told Holliday that he was sixth on the list to be fired (8:1588). Before 10 September, Holliday testified, several others had been fired for having old beer on their routes (9:1621). Holliday testified that he never told any supervisor or manager that he was going to resign (8:1588). As of 10 September no one told him he had violated any rule (9:1621–1622). Indeed, he concedes that about 2 weeks earlier Powers rode with him on the route and stated that he found no old beer (8:1589–1590).

Hunt denies that he dispatched anyone specifically to look for old beer on Fred Holliday's route. Indeed, Hunt testified, Holliday was doing a fine job, had done nothing to be discharged for, but simply resigned (1:90–92). At the hearing, neither Hunt nor Hayes described the 10 September conference where Hayes gave Holliday his final two checks.

At his 7 November unemployment compensation hearing before the Texas Employment Commission (TEC), Holliday testified that Hayes and Hunt told him that he was discharged for being a leader. When asked what kind of leader, Holliday answered ''union activities.'' (G.C. Exh. 63–6) Before me, Holliday could not recall being asked at the TEC whether he was given a reason for his discharge, nor could he remember saying at the TEC that Hayes and Hunt told him the reason for his discharge was because he was a union leader (9:1624–1625).

Payroll clerk Carrie Jean Skinner testified that Holliday came to the office one evening, said he had resigned, and filled out papers relating to his pension plus a letter of resignation to be signed when an employee resigns. Skinner and the other office clericals, who have known Holliday for years, hugged him, said they hated to see him go, and wished him the best (16:2832–2833). None of the forms Skinner mentioned, particularly the resignation letter, was offered in evidence by Respondent.

Testifying in rebuttal, Holliday asserted that about 9:30 to 10 the morning after he was fired he went to the office to pay the balance he owed SDC. Before Holliday said anything, the office clerks, on seeing Holliday, said they were going to miss him and hugged him. He said he would miss them. About that time owner Georges appeared at the door to the office, Hayes walked by, and the office clerks ''scattered.'' (17:3041–3044, 3047–3048) Holliday testified that he came that morning to see Vice President Ralph Baldwin or his assistant, Bob Toombs, and he denies having any conversation with Skinner about quitting, denies that he told her or any of the clerks he was quitting, denied that Skinner mentioned it, denied that he signed anything which said he quit, and identified the pension fund ''Termination Notice/Election Form'' (G.C. Exh. 66) which he did sign (17:3041–3044, 3046).

Dated 11 September 1984, the pension form shows Fred C. Holliday's ''Termination date'' to be ''9–10–84.'' Three signatures are on the form: Holliday's, that of Office Manager R. L. Toombs, and, as witness, Carrie J. Skinner. If ''Termination date'' is read in its neutral sense, as I would read it, nothing on the form asserts that Holliday either resigned or was discharged.

I credit Holliday's version of his visit to SDC's office on 11 September.

(2) Conclusions

Crediting Holliday, as I do, concerning his version of events, the question remains: did he quit or was he fired (constructive or otherwise).

The General Counsel argues that the sequence of events reflects an unlawful effort by Respondent to intimidate Holliday by threats and pressure so that either he would quit or Respondent, on the pretext of finding some old beer or terming his telephone call to Hayes as a threat, could fire him. Unlike with Lofton who refused to take the bait about resigning, the General Counsel argues (Br. at 104), Holliday, knowing that his days were numbered in light of all events, including the discharge of others for old beer, felt it would be futile to protest, and meekly accepted the inevitable. These circumstances amount to a constructive discharge the General Counsel argues (Br. at 104–105). The Union describes Holliday's departure as a discharge disguised as a resignation (Br. at 25).

Asserting there is no evidence of any plan to fire Holliday or to force him to quit, and arguing that it appears Holliday was either tired of working at SDC or lived in some ''paranoia filled fantasy'' in which Respondent was ''out to get him,'' Respondent contends that any contention by the General Counsel (disavowed at the hearing) of constructive discharge fails because the test of a constructive discharge is not met here (Br. at 204–205).

Citing *Crystal Princeton Refining*, 222 NLRB 1068, 1069 (1976), Respondent observes that the Board's definition of constructive discharge includes two elements.

> *First*, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. *Second*, it must be shown that those burdens were imposed because of the employee's union activities.

Assuming, for the moment, that I would be prepared to find affirmatively as to the second element, the big problem facing the General Counsel is whether the sequence of events (on which I have credited the General Counsel's evidence) amounts to working conditions so difficult or unpleasant as to force Holliday to resign. It is difficult to conclude that Holliday's working conditions, even if they were progressing in the direction of being unpleasant and difficult, had reached the unbearable point.[147]

The real problem is that neither concept (discharge or resignation) occurred expressly as in ''You're fired!'' or ''I quit.'' Which was it? As I view it, the intent of both Respondent and Holliday must be considered. What did they intend by their conduct? I find that Respondent, pouncing on Holliday's expression to Powers that he was considering resigning, intended to pressure Holliday into accepting resignation checks, and that Respondent's purpose for doing so was to eliminate from its payroll a driver-owner Georges, according to Hayes and Gray, considered to be a union steward and one who should be seeking employment where there was a

[147] Recall that there had been no change in his pay, job classification, or other usual working conditions. The changes were in the form of a threat that he should seek work elsewhere and possible oversupervision on 10 September designed to find a pretext for discharge.

union. I therefore find that in handing the two checks to Holliday, Respondent was motivated by unlawful reasons.

I further find that Holliday, apparently intimidated by Executive Vice President Hayes and Sales Manager Hunt, meekly accepted the resignation checks with an ''Okay'' because the circumstances indicated to him a futility to protest.

If the circumstances objectively reflected that it would have been futile for Holliday to protest, that is, that any protest would have met with discharge either then or later on a pretext, then the situation would be ripe for finding a discharge. But there is no showing that if Holliday had protested Respondent would have fired him by insisting that he had in fact resigned. Indeed, the indication is that Respondent, as in Lofton's case, was throwing out a bait which could be withdrawn if need be. In short, there is no showing of immediate futility, and I find that there was no actual discharge.

As for futility because of what Respondent might do in the future, that merges into the concept of constructive discharge. As of 10 September, I find that Fred Holliday's working conditions had not reached the stage where they could be called unduly difficult or unpleasant.[148] Thus, there was no constructive discharge, and I shall dismiss complaint paragraph 26 as to Fred Holliday.

3. The discharges for failure to report vehicular accidents

a. *Introduction*

As mentioned earlier, three drivers were fired, on the following dates, for failing to report vehicular accidents: John A. Holliday—30 October 1984; Edward Hartman—21 November 1984; and Ira C. Strange—28 November 1984.

President John P. Fauntleroy's 1 July 1981 ''General Policy'' rules covered this subject by rule 4. Under paragraph (a) of that rule, on any accident appearing to result in damage of $50 or more to *either* vehicle, ''call police immediately.'' Under rule 4(d), the driver was to submit an accident report ''to the office'' immediately on arriving back at the warehouse.

As described by Howard Lofton, Respondent's past practice was consistent with old rule 4. Lofton testified that in SDC's past practice regarding accidents, drivers would telephone the office as soon as possible and report the accident to Ralph Baldwin. Later, Office Manager Bob Toombs succeeded Baldwin in that responsibility, and reports then were telephoned to Tombs. If neither Baldwin nor Toombs was available, the driver notified some supervisor or manager. The blue forms[149] were filled out thereafter (11:2151, 2167–2169).

Former Vice President Crouse testified that as a route supervisor around early 1982 he had occasion to issue a written warning to driver James Ornalik who failed to report a minor accident. Crouse discovered the minor damage to the lower panel by one of the doors. Sales Manager Les Mattinson reduced it to an oral warning (2:250, 272).

Crouse testified that he did not know of an employee ever being fired by SDC for failing to report damage to a vehicle (2:270–271). Craine testified similarly regarding his tenure with SDC (13:2337–2338). The parties stipulated that SDC has no record of any employee being disciplined between 1 August 1982 and 1 March 1985 for failure to report an accident (12:2179–2181).[150]

Next, we come to the new rules—the ones implemented 1 June 1984.[151] They provide, on pain of discharge at first offense:

> 10. All accidents involving company vehicles must be reported from the scene of the accident to the proper law enforcement official and also to the supervisor on duty.
>
> 11. Written reports of all accidents must be made immediately upon returning to the company premises.

Holliday's 26 October accident involves damage to the bumper of another SDC vehicle on the company compound. The bumper had to be replaced at a cost, including labor, of $179 (G.C. Exh. 23).

On 20 November, as Hartman drove his vehicle between two others on a narrow street, his side mirror hit and broke the side mirror of a parked truck.

Strange was discharged over an alleged delay in reporting a dent in his truck which he discovered on Friday, 23 November.

Sales Manager Hunt testified that, for any vehicle accident, the driver must make an oral report immediately to his supervisor, or to Hunt, or to anyone in management (1:100–101).

b. *John A. Holliday*

(1) General facts

SDC hired John A. Holliday in July 1977 (4:686), and fired him on Tuesday, 30 October 1984).[152]

Holliday was a member of the Union on dues checkoff (4:689–690; R. Exh. 64). Although Holliday never held any elected or appointed position in the Union (4:766–767), he did not sign a membership revocation letter (G.C. Exhs. 15, 16), and he rejected then driver (and alleged agent) Ross Miller's request in early June that he sign the decertification petition Miller was circulating (4:712–714, 731, 771–773, 784). As we recall from Crouse's testimony, Holliday's failure to sign these documents was duly noted by Craine in discussions with Crouse and by Craine and Gray in the midsummer scoreboard meetings of Respondent's management nucleus (2:309; 3:440, 529–532).

Crouse identified John Holliday as one of those on Hayes' spring 1984 hit list for reasons apparently unconnected to his union membership (2:347, 358; 3:487). As we know, Crouse

[148] The Board finds that the constructive discharge test is met when an employer gives a union advocate the Hobson's choice of continued employment only if he agrees to abstain from exercising his rights under the Act. *CER, Inc.*, 269 NLRB 1070, 1074 (1984), enfd. 762 F.2d 482 (5th Cir. 1985). We do not have that here either expressly or by virtue of conditions so unpleasant as to force (for unlawful reasons) a resignation.

[149] A reference, apparently, to official accident report forms filed with the State.

[150] Excluding, of course, the three alleged discriminatees.

[151] I utilize the principal copy of the rules attached to the negotiated collective-bargaining agreement (G.C. Exh. 18). The secondary copy of the rules (R. Exh. 7) inadvertently omits safety rule 23, and, therefore, the numbers of those which follow are different from those in G.C. Exh. 18.

[152] The complaint alleges the discharge date to be 28 October 1984, a Sunday. Although Holliday testified he was fired on 28 October, he also dated his discharge as about 4 days after his accident (4:700). Because it is undisputed that the accident occurred on Friday, 26 October, and in light of the 4-day span described by Holliday, I find the discharge date to be 30 October.

testified that he was unaware of any correlation between Hayes' hit list and Craine's scorecard (2:351). Finally, Holliday was not one of those specifically named in early August by Craine as ''troublemakers'' to be eliminated (2:316).

Holliday's vehicle accident of Friday, 26 October, came about in this way. As Holliday drove out of Respondent's truck shed he turned to his right. Unfortunately, the external mirror on Holliday's passenger side was bent back so that Holliday was unable to see to his right rear by use of the mirror. Holliday misjudged his turn and hooked the front bumper of the truck to his right. Although Holliday's truck sustained no damage, the bumper on the truck of his neighbor (driver James Brown) was pulled out several inches (4:702, 764–766; R. Exh. 12). As previously mentioned, the bumper on Brown's truck was later replaced at a cost, including labor, of $179.

Holliday stopped and conversed with Brown. Observing that there was no damage to his own truck, Holliday suggested that Brown take his truck to SDC's garage and report the accident. Holliday said he would call in from his route to make his own report. Brown agreed (4:702, 746–748). Holliday concedes that from the point of the collision to the office was about 50–100 yards (4:748).

Rather than stepping over to the office and reporting the collision, Holliday proceeded to his route. Around 10 to 10:30 a.m., at his normal time to call in, Holliday telephoned SDC and asked for Office Manager Bob Toombs,[153] but the dispatcher or receptionist said Toombs was not there and that Steve Hudson, assistant controller, wanted to talk with him. Apparently Hudson was not present either at this moment (4:703, 749–753, 788).

When Holliday made his usual afternoon call around 2 or 2:30 p.m. he spoke with Hudson who asked if Holliday had hit the (Brown's) truck. Yes, replied Holliday. Was Holliday's truck damaged, Hudson inquired. No, answered Holliday. That was all he heard about the matter, Holliday testified, until a few days later (4:704–705, 750–751).

On Tuesday morning, 30 October, Supervisor Andrew Thomas instructed Holliday not to leave on his route because ''they'' wanted to talk with him.[154] Moments later Ross Miller, a supervisor since 1 September, came and the group went to Sales Manager Hunt's office. Present were Miller, Thomas, John Holliday, Hunt, and Executive Vice President Hayes (4:705–706).

Hunt asked if Holliday knew he had hit the (Brown's) truck. Yes, said Holliday. To Hunt's question of whether Holliday's truck was damaged, Holliday answered no. When Hunt inquired whether Holliday knew that he was supposed to report the accident, Holliday replied that he had reported it to Toombs. Hunt said that Holliday was not supposed to report it to Toombs, but to Holliday's supervisor. Holliday replied that he did not know that (4:706).

Hunt stated that there were bulletins and rules posted on the wall instructing drivers about this. Holliday said he had not seen it and was ignorant of that part. ''No, you're not that or we might've overlooked it,'' responded Hunt. Hitting a truck without reporting it brings about dismissal, said Hunt, who added, ''I'm sorry, John, but we're going to have to let you go. Now, whenever you need any assistance in getting another job, just give us a call.'' (4:707)

Holliday testified that there are hundreds of rules posted at SDC. He does not recall that Hunt or his supervisor took him and other employees over and showed them the rules. He testified that he had never seen the set of new rules in evidence as Respondent Exhibit 7, although he has read some of the posted rules (4:755–756).

Hunt testified that John Holliday was fired for departing on his route without reporting his accident (1:99, 101). During their testimony, neither Hunt, Hayes, nor Miller described Holliday's discharge interview, and Supervisor Thomas did not testify.[155]

James Bailey testified that after John Holliday was fired, James Brown, a member of the Union, succeeded to Holliday's route (12:2236–2238). Although Brown had been on dues checkoff (R. Exh. 64), he signed a union membership revocation letter (G.C. Exhs. 15–19, 16–4), and he signed in place 34 on the decertification petition (G.C. Exh. 2).

(2) Conclusions

The General Counsel and the Union see John Holliday's discharge as the result of his failure to support the decertification movement. This, coupled with mention of his name as a nonsigner, as a member of the hit list, the disparity shown by the lack of prior or past event discipline for other accidents, plus the minor nature of the accident which occurred on SDC's premises, persuade them that Holliday's discharge was unlawful. I accord no weight to the disparity argument because there is no evidence that there were other accidents, and an alleged failure to report them, after 1 June 1984 besides the three in issue here.

There is an abundance of evidence that Respondent frequently reminded its drivers of SDC's rotation policy and their duties regarding beer approaching overage. In contrast, there is no evidence that Respondent specifically instructed its drivers that the new (as of 1 June) policy required them to report accidents to their supervisors. Indeed, Holliday complied with general rule 10, and a literal interpretation of safety rules 10 and 11 would read them as applying to accidents occurring away from SDC's premises.

Respondent, of course, is free to interpret its rules as it wishes—so long as that interpretation is not unlawfully motivated. And that is the question: Was Respondent unlawfully motivated here? It could be argued that if Respondent had been out to ''get'' John Holliday it could have done so when it, as Holliday described, gave him a 1-day suspension in mid-October for having some old beer on his route.[156] However, it appears that Holliday had previously told Supervisor Thomas about that old beer and that Thomas said he would

[153] On an earlier occasion, date unspecified, when his helper drove into a 7-Eleven store and broke a light, Holliday reported the accident to Toombs (4:703).

[154] Although the complaint lists Andrew Thompson as a supervisor, and Holliday thought that was his supervisor's name (4:687–689), it appears that the supervisor is named Andrew Thomas. Whether Thomas or Thompson, the supervisor did not testify.

[155] President Craine identified a brief accident report, dated 26 October, signed by Supervisors Brian Wilson and Andrew Thomas (7:1282–1283; G.C. Exh. 23). Wilson apparently supervised Brown.

[156] The General Counsel does not allege in her complaint that the 1-day suspension was unlawful.

take care of it. Instead, Thomas suspended Holliday for 1 day over the old beer Holliday had reported (4:694–699).[157]

I find that Respondent was unlawfully motivated in discharging John A. Holliday. Even though Holliday might be charged with the responsibility for knowing the correct rules, the fact is that SDC made it a point to train employees regarding the rotation policy—but not, so far as the record shows—the new (and potentially confusing) policy regarding reporting of accidents.

Holliday can be faulted for not walking over to the office to report the accident. Still, he did call in and report. Respondent strains to reach an interpretation of the rules by which to justify discharging Holliday because he failed to report the accident to his supervisor before he left the premises. Had Respondent warned Holliday, or even suspended him for 2 or 3 days, it is possible the General Counsel would not have contested the matter.

The discharge is overkill which suggests an unlawful motive. Finally, I simply do not believe Hunt on this or any issue. Having found that Respondent was unlawfully motivated in firing John A. Holliday, I further find that it would not have discharged him had he abandoned the Union and supported the decertification movement. Accordingly, I shall order Respondent to offer John A. Holliday reinstatement and to make him whole.

c. *Edward Hartman*

(1) General facts

Edward Hartman worked at SDC from 1972 until Executive Vice President Hayes fired him the early morning of 21 November 1984 for not reporting an accident Hartman was involved in the day before (7:1228, 1230).

Hartman was a member of the Union and had been on dues checkoff (7:1228–1229, 1236; R. Exh. 64), but he had never held a position in the Union, never filed a grievance, and no supervisor ever discussed the Union with him (7:1248). Although Hartman never signed the decertification petition (7:1229; G.C. Exh. 2), no one asked him to do so (7:1260). Indeed, because of a job-related injury sustained 29 May, Hartman was off work from his injury until 24 September (7:1229–1230). During that time off he returned to the plant only once and that, at the Union's request, was to vote in the RD election on 30 July (7:1259–1260).

A couple of months after he returned to work, Hartman was involved in a slight collision about a block and a half from SDC's compound (7:1231). As he approached the plant on a side street he observed that two trucks of a nearby plywood company were parked on either side of the street leaving a narrow passage. Nevertheless, Hartman observed that another truck was able to pass safely between the two parked trucks. Hartman, accompanied by helper Richard Luna, then proceeded to drive between the two parked trucks (7:1231–1232, 1245).

As Hartman proceeded at about 3 miles per hour between the parked trucks, the side view mirror on the passenger's side of his vehicle struck the side mirror on the driver's side of the truck parked to Hartman's right. The contact rotated Hartman's mirror clockwise, or inward, so that it reflected Hartman in the driver's seat rather than the street on Hartman's right (7:1232, 1245, 1254).

Without stopping his vehicle, Hartman told Luna to straighten their mirror. After Luna did so, Hartman looked into the side mirror and, seeing no damage to the other vehicle, proceeded to the plant for a reload (7:1232, 1246, 1255). As he looked back in this fashion, Hartman observed a helper or someone seated on the passenger side of the parked truck. Hartman denies hearing anyone yelling at him (7:1256–1257). Hartman never stopped during his passage between the two parked trucks even though he knew the two mirrors had hit (7:1246, 1254). The time was about 1 p.m. (7:1237).

Within 3 or 4 minutes Hartman had parked at the warehouse for a reload (7:1239). About 30 minutes later Hayes approached Hartman and Luna at the warehouse. Hayes asked Hartman if he knew he had broken a mirror on the other truck. No, answered Hartman.[158] Hayes then said, ''Well, Richard here [referring to helper Richard Luna] had told me about it, told me that you had hit the mirror. Go on back out on your route.'' (7:1234) Hartman concedes that he did not submit any written accident report. On the other hand, Hayes did not tell him to do so (7:1234). Hartman observed a truck from the plywood company on SDC's premises. He checked the mirror and saw that the glass was missing (7:1256).

About 7 the next morning, 21 November, Hartman was called into Hayes' office. Present were Hayes, Hunt, Supervisor Emanuel Flores, and Hartman. Hayes began by saying, ''Ed, I'm going to read you the company rules about not reporting an accident.'' He then ''read the rules to me,'' Hartman testified, and concluded by telling Hartman, ''This calls for immediate dismissal.'' With that Hayes handed Hartman his paycheck (7:1234–1235).

Hayes asked if Hartman had seen the rule, and Hartman replied no. They are posted on the bulletin board, responded Hayes. To this Hartman said the bulletin board was so cluttered with papers that ''you can't tell what's up there.'' Hayes said Hartman did not report the accident. Hartman replied that he thought their discussion the day before sufficed. Makes no difference, Hayes stated, ''It's dismissal.'' (7:1235) The interview lasted about 2 minutes (7:1247).

Hayes did not cover Hartman's discharge during his own testimony, and Flores did not testify. Hunt testified that the sole reason Respondent fired Hartman was his failure to report the accident (1:108).

Hartman testified that he was present at the ratification meeting on 31 May when the entire collective-bargaining agreement was read, although he does not recall whether any work rules were read. He further testified that he was off work when any rules were posted, that he never saw them, that he never heard any talk about the work rules from supervisors or other drivers, that the bulletin board was cluttered with all kinds of papers, including cartoons, but he is sure

[157] The Union suggests that Respondent ceased using old beer as an excuse to fire the union holdouts when the instant charges were filed and served in mid-September (Br. at 26).

[158] At this point Hartman testified that he knew the mirrors had ''touched'' but he was unaware of any damage. It is unclear that such testimony was part of the answer he gave to Hayes (7:1233–1234). Hunt testified that on the morning of 21 November he confronted Hartman about the matter and Hartman said he was unaware he had damaged the other vehicle (1:109). It is unclear whether Hunt meant that conversation was part of the discharge interview or a separate conversation.

SDC has work rules. He just never saw them or heard what they contained (7:1236, 1250–1253).

According to Hartman, although he filed an unemployment claim with the TEC following his discharge, he did not attend the hearing on his appeal because he could not draw unemployment plus worker's compensation (7:1257–1258). Hartman did not explain why he filed a claim with the TEC at all if it conflicted with his worker's compensation, nor did he explain how he was eligible to receive worker's compensation after he had returned to work.

(2) Conclusions

Assuming that Hartman's conversation with Hayes satisfied general rule 10 and safety rule 10, it is clear that Hartman did not comply with safety rule 11 which calls for a *written* report of all accidents (not simply accidents with damage) to be made immediately on returning to the premises

To the extent Hartman meant that he heard no talk about company rules in general after he returned to work on 24 September, I do not credit him. I do credit him to the extent he means that no one focused on the accident reporting rules. Still, the law does not impose on an employer the standard of fairness. Even if Respondent acted unfairly and overreaching toward Hartman, that is immaterial—unless the facts and inferences indicate that in actuality Respondent seized the opportunity to eliminate one more nonsigner of the decertification petition.

As for the damage to the mirror on the plywood company's vehicle, I find it very likely that both Hartman and Luna were aware that their truck broke the mirror of the other truck. I find it likely because the metal back of Hartman's mirror would have struck the glass portion of the other mirror right by their truck cab as they passed. I do not credit Hartman's claim that he was unaware of any damage.

The General Counsel observes (Br. at 117) that Hartman was one of the names on Hayes' hit list (2:347, Crouse). Once again, however, Hayes and Crouse discussed that list a couple of months before the decertification movement began. Moreover, Hartman's name is not shown in the record as one of those mentioned in the scoreboard meetings of the management nucleus in the weeks before the RD election (3:440, 530). He was not one of the group Craine told the managers not to bother trying to sway (2:286, 311–312), he was not named as one of the hardcore three of Lofton, Rice, and Tharp (3:535), nor was he named by Craine in early August as one of the troublemakers to be eliminated (2:316).

Perhaps Respondent did not give sufficient weight to the fact that Hartman, off work all summer until 24 September, had not received proper training on Respondent's new rules. Perhaps Hayes, on 20 November, should have told Hartman to file a written report, and perhaps it was unfair to fire him the next morning for not filing that report when Hayes himself did not consider it important enough the day before to tell him to file one in writing. May an inference be drawn that Respondent concluded from the fact Hartman came to vote that he voted for the Union, and that such conclusion explains any unfairness Respondent displayed by zapping him after accepting an oral report? I am afraid the object of the General Counsel's reach exceeds her grasp.

Under all the circumstances it appears that the General Counsel has not carried her burden respecting Edward Hartman. Accordingly, I shall dismiss complaint paragraph 26 as to Edward Hartman.

d. *Ira C. Strange*

(1) General facts

Ira C. Strange worked 14 years for Respondent. Hired by SDC in November 1970, Strange was fired by Respondent on 28 November 1984 (6:1075). Hunt testified that Strange was fired for not reporting an accident to his truck. Hunt modified this to say that although Strange did file a written report, he did not do so for 3 or 4 days after the accident (1:110).

In fact, as I find , Strange did not himself have an accident in his truck. Warehouse personnel park the trucks, and it appears that a warehouse employee bumped the truck against a post, or some other object, and the force of the bump created a dent in a slot in the truck body at the rear of the truck where the loading plate of the dolly slides (6:1079, 1156). The gas tank also was nicked (6:1164; R. Exh. 21).

At the first stop the morning of Friday, 23 November, Strange removed the dolly from the back of the truck prepatory to servicing the store, a Kroger's. When the dolly was removed, Strange was able to see the dent (6:1078–1079, 1097, 1111). Strange attempted to reach Assistant Controller Steve Hudson in the office, but Hudson was out and so was Strange's supervisor (6:1080, 1131). Strange called the garage and learned that no one had reported an accident over the Thanksgiving holiday of 22 November (6:1132–1133).

Mark Horner was Strange's supervisor (6:1075; 15:2574). That morning Horner went to the Kroger's store to help Strange erect a display. It is unclear whether he was there when Strange arrived, or whether Horner arrived shortly after Strange (6:1081, 1082, 1131, 1138, 1144). In any event, Strange testified that he showed the dent to Horner, told him that it was not there when he returned the truck the afternoon of Wednesday, 21 November (the day before the Thanksgiving holiday), and said that he did not discover it until just them. According to Strange, *Horner* remarked that it must have happened in the warehouse over the holiday (6:1081–1082).

Horner denies that *Strange* reported an accident to him and denies that Strange told Horner the truck had been damaged in the warehouse (15:2575, 2581). Notwithstanding the nature of the question addressed to Horner, I construe his testimony to be a denial that the Kroger's store conversation occurred.

Hunt testified that 2 or 3 days after the damage Supervisor Ross Miller asked him if the damage had been reported. Hunt said no. Miller, according to Hunt, told Hunt that he had asked Strange about it and Strange said he had not reported it but would write it up then (1:110).

Miller testified that one of the mechanics asked him if the driver of the truck had reported the damage, and that after this Strange told Miller the truck was damaged (5:965, 968). If the dent was repaired, the record contains no evidence as to the cost to repair the vehicle.

Strange did not work Monday, 26 November. On 27 November Strange tendered a written report on the damage to

Ross Miller before leaving for work on Tuesday morning, 27 November (6:1083–1084; R. Exh. 21).[159]

At the bottom of the report appears a handwritten note by someone, unidentified, other than Strange (6:1164):

> This report written on 11/27/84. Why didn't he write it up on the 23rd after checking in?

On Wednesday morning, 28 November, Strange was fired. Present in Hunt's office were Hunt, Supervisor Ross Miller, and Daryl Buchanan (employed in an unidentified capacity with a different division of SDC), and Strange (6:1085).[160] Hunt said he had to terminate Strange because he had not reported the accident before leaving ''that'' morning.[161] Strange said he had made the report and given it to Ross Miller.[162] Hunt apparently turned and asked Miller about it. Strange does not give us Miller's response (presumably Miller replied that the written report was not submitted unti1 27 November), but Hunt eventually told Strange he still would have to terminate him, and that Strange should come in the next day to pick up his check (6:1086–1087, 1112–1113).

When Strange came in the next day to get his check, he also visited Executive Vice President Hayes. In the conversation it was decided that Strange would call back later when Craine was in and request a conference with Craine concerning Strange's discharge (6:1087–1088, 1209–1210). Strange did so and such a meeting was thereafter scheduled.

In the first week of December,[163] Strange met with Craine. Hayes also attended and took notes (6:1089, 1183, 1208). Strange told Craine that the dent apparently happened in the warehouse before he took the truck out on his route the morning of Friday, 23 November, that he did not have any accident with the vehicle, and that he tried calling in the morning of 23 November (6:1089, 1183–1184). Hayes' memo records Strange as making these same points. The memo also shows that Strange stated that he could not have seen the dented area until he removed the dolly,[164] and adds that Strange also told Craine he was off work 26 November and filed a written report on 27 November (G.C. Exh. 23). At no point does Strange testify, or Hayes' memo reflect, that he told Craine of a conversation with Supervisor Horner at the Kroger's store the morning of Friday, 23 November. I am not persuaded that the Kroger's store conversation occurred.

Craine said he would review the case and for Strange to call him in a few days. On 10 December Strange called him. Craine told Strange he would have to go along with management's decision (6:1089–1090).[165] Strange's appeal had failed.

Turning back now to look at Strange's union activities, the record reveals a ''mixed bag.'' Although he was a member of the Union, he held no elected or appointed union position (6:1093–1094). Indeed, Strange even signed the decertification petition (6:1096, 1105–1106, G.C. Exh. 2). He did not sign a union membership resignation letter, however (G.C. Exhs. 15, 16), and Skinner's 3 August list of those on dues checkoff includes his name (R. Exh. 64).

At the scoreboard meetings, Crouse testified, Strange was considered solidly procompany (2:311). Crouse also testified that on the day of the RD election Supervisor John Roschal came to him outside the salesroom and reported that he had observed Ira Strange going back and forth between the hospitality room, where the employees were voting, and the north side of the compound where several union representatives were standing at the street. Crouse said it appeared that Strange had put one past them. Roschal commented that all this time he thought Strange was on ''our'' side when in fact he had been working for the Union. Roschal stated that he already had notified Gray, Craine, and Bambace and that they had ''freaked out.'' (2:314–315, 403–404)

Strange, however, denies that he went ''back and forth'' that day, and testified, instead, that he had coffee that morning with some union representatives and union supporters at a nearby Pig Stand restaurant some three or four blocks from the plant before going to vote (6:1104, 1115). Strange, who did not work that day, did not address whether at any point, while the polls were open, he went to the north side of the compound and conversed with the Union's representatives.

Supervisor Roschal testified that on election day he observed Strange talking, at different times, to different persons, including Union stewards and representatives from Teamsters Local 1111 plus one of the Union's International representatives. Roschal denied discussing these observations with Crouse, he specifically denied telling Crouse that he thought Strange was on ''our'' side but that it appeared he was working for the Union, and he testified that he very seldom engaged in small talk with Crouse and had no idea whether Strange led people to believe he was for SDC regarding the decertification (14:2533–2534, 2539–2541).

During their own testimony, neither Gray, Craine, or Bambace addressed the subject of whether on election day Roschal made a report to them concerning Ira Strange.

Crouse, as I have found earlier, testified in a sincere manner. Although Roschal denies making the report and the remarks Crouse attributes to him, Roschal confirms the very facts underlying the report Crouse described. I credit Crouse and his testimony on this subject.

Notwithstanding the surprise of SDC's officials that Strange had fooled them regarding his true sentiments regarding the Union, Strange admits that he subsequently requested—and received—help from Respondent concerning

[159] I do not credit Strange's testimony that he prepared the report on Friday, 23 November and attempted to file it but it was so late no one was there to take it.

[160] There is no explanation in the record why Buchanan was present rather than Supervisor Horner. Horner simply testified that he was not present (15:2586).

[161] The ''that morning'' apparently is a reference to the morning of Friday, 23 November 1984.

[162] Strange's testimony here suggests that he telescoped the different days and events (6:1086, 1112). Eventually, however, he testified that he offered no explanation for not reporting the matter before leaving the premises (6:1113). Of course, he had not discovered it as of that time, but he apparently said little in his own defense. Missing from Strange's account is any assertion that he described to Hunt the conversation he supposedly had with Supervisor Horner at a Kroger's store the morning of 23 November.

[163] Strange testified that the meeting occurred on 3 December (6:1089, 1183), but Hayes, in a file memo, dates the occasion as 6 December (G.C. Exh. 23).

[164] This is an apparent response to Hunt's contention that Strange should have reported the dent before he left the truck shed that 23 November. Although Strange's helper, not Strange, inspected the truck the morning of 23 November (6:1130), Strange's point is that even if he had walked around the vehicle making a visual inspection he would not have seen the dent because it was covered by the dolly.

[165] Craine touched only briefly on Strange's appeal saying that Strange requested consideration based on his length of service. Craine's brief testimony is generally consistent with that of Strange on this point (2:216–218).

his arrest on a charge of driving while intoxicated (DWI). The matter came about in this way. Three or four days before the 30 July election, Strange, while off duty and in his personal car, was arrested on a DWI charge (6:1180–1181). Strange attended the free beer party SDC gave the day in August when the election results were finalized. At that celebration party, Strange approached Attorney Bambace, told him about the DWI charge, and asked if Bambace could help him. Bambace said he would talk to Hayes and the matter would be taken care of (6:1118–1119, 1212, 1221). Thereafter, Hayes sent Strange to Attorney Bob Hunt who represented Strange in the court proceeding (6:1122). In addition to the DWI charge, Strange had received at least one more ticket, and that was for running a stop sign (6:1122–1123).

Although Strange denies he had a prior DWI conviction, he concedes that his commercial driver's license was suspended for a week in the 1970s (6:1212, 1219). Depending on the Texas law and the enforcement policy current at the time, a second conviction (if there was a first one) for DWI could have been a very serious matter, and another suspension of his driver's license was probably not the maximum penalty he faced if in fact his first suspension was for DWI. Although Strange apparently was found guilty on the July 1984 DWI charge (the stop sign ticket was dismissed), Attorney Hunt succeeded in obtaining a probated 2-year sentence plus a fine of $250 to $300 (6:1123–1124). Strange testified that he does not know who paid Hunt's fee for representing him, but he does know that he did not pay Attorney Hunt (6:1124). I find that SDC paid Hunt's fee as a favor to Strange.[166]

Despite Respondent's assistance to Strange on his DWI charge, recall that it was in this same timeframe that Craine, in a conversation with Crouse in Craine's office, named Strange as one of the *troublemakers* whom Respondent, now that the election results were final, could proceed to get rid of. Crouse was surprised that Craine named Strange along with Lofton, Rice, and Tharp (2:316). I find that Craine added Strange to his list of troublemakers because Respondent observed Strange consorting with union representatives the day of the RD election.

In my earlier discussion of Fred Holliday's case I summarized the late August incident when Fred Holliday and three other black employees, including Ira Strange, were called into Hayes' office. Although Fred Holliday's ''preaching'' and the threat conveyed by Hayes on behalf of owner Georges were the focal points of that meeting, the fact is that Strange was one of the group called in and threatened along with the others for participating in protected concerted activity (discussing the justness of the discharge of a fellow black employee).

The next incident to consider occurred, by Strange's account, in early November and involved Strange, Herbert Kyles (Strange's brother-in-law), and Supervisor Ross Miller in a conversation held in the check-in room where the drivers assemble in the mornings. In 1983 Kyles apparently worked some for SDC from its ''extra board'' of drivers (6:1218). In early November 1984, after Kyles already had worked a couple of days as a substitute (from the extra board, apparently), Strange, in Kyles' presence, asked Miller if Kyles could work the extra board. Miller said yes but he (Miller) did not want to hear any more talk about a union.[167] Strange said okay (6:1191–1194, 1214–1219). Strange testified that he had never previously had a conversation with Miller in which the subject of a union was mentioned (6:1217).

At page 6 of his pretrial affidavit of 26 March 1985 (U. Exh. 5), Strange's description of the incident reads (quotation marks added):

> Around November 1, 1985,[168] I was in the check-in room about 7:00 a.m. Ross Miller and I were present.[169] Miller had let my brother-in-law, Herbert Kyles, work as a substitute for about a week. Miller walked up to me and said, ''I'll let your brother-in-law work the extra board. I don't want to hear anything about a union any more.'' I didn't say anything.

Supervisor Ross Miller, called by the General Counsel, testified before Strange. Respondent did not call Miller during its own case-in-chief. Thus, Miller never was asked about the conversation Strange described regarding Herbert Kyles. At pages 2–3 of his pretrial affidavit of 23 April 1985 Miller gives a rather detailed description of this matter (U. Exh. 3.[170] However, as Miller's pretrial statement was received only in relation to another subject (5:963–969), I attach no weight to his pretrial account of the matter.

Although Strange's account stands uncontradicted by Miller, I do not credit Strange's version; There is no evidence that either Strange or Kyles had been making any comments in support of a union. Although I could credit Strange without Kyles corroborating his version, where Strange's account does not fit well with the other facts, Kyles' testimony could well carry the day. In short, I make no finding that Supervisor Miller did not remark about no more union talk; I simply find that the General Counsel's limited evidence falls short of persuading that Miller did so remark.[171]

The final incident to be considered involves the testimony of driver Benjamin ''Buddy'' Hilligiest.[172] Driver Hilligiest testified that after work some of Respondent's drivers would frequent Kun Ming's, a drive-in grocery and ice house not far from SDC's premises, to sip a product of the brewer's art. According to Hilligiest, in late March 1985 he had a conversation with Louis Riley and Ira Strange at Kun Ming's. Riley asked Hilligiest to go to the Labor Board and give a statement, and when the case was settled and they got their money from SDC, they would give Hilligiest some of the

[166] Respondent argues that its ''generous and benevolent assistance to Strange'' on his DWI charge rebuts any allegation that it harbored animus against Strange or subsequently discriminated against him (6:1121; Br. at 196). That is to say, had it held him in disfavor for any union sentiments it hardly would have so generously assisted him on his DWI charge. Indeed, Respondent argues that had it wanted to get rid of Strange, it could have sat back and let the Texas authorities take away his license to drive (Br. at 196–197). In their briefs, the General Counsel and the Union do not address Respondent's assistance to Strange on his DWI charge.

[167] There is no complaint allegation concerning this remark which Strange attributes to Miller.

[168] The year 1985 is an obvious error (placing the event after the affidavit) and should read 1984.

[169] Before me Strange testified that Kyles also was present (6:1194). Kyles did not testify.

[170] The description essentially supports Strange's version regarding such a conversation, which Miller places in September, except that Miller denies the portion about reference to union talk.

[171] Strictly speaking, it is the Union's evidence here, for the issue did not arise until the Union's redirect examination of Strange.

[172] The General Counsel and the Union do not treat this incident in their briefs.

money. Strange agreed, saying they would all chip in (16:2888, 2889, 2893, 2897). No specific amount of money was mentioned, and Hilligiest was not asked to offer any false information (16:2893, 2897–2898).[173]

Hilligiest eventually gave an affidavit to the Labor Board. He testified that he told the truth in that statement (16:2893, 2900–2901). In a subsequent statement which he gave on 25 November 1985 (G.C. Exh. 65), Hilligiest describes Riley as making the offer of money when just the two of them were present, and that Strange, a couple of weeks later in the presence of Riley, gave Hilligiest the card of one of counsel for the General Counsel so Hilligiest could call the government lawyer. At no place in his supplemental affidavit does Hilligiest describe Strange as making a money offer, or being present when Riley made one. Nevertheless, Hilligiest testified, Strange did (16:2893, 2897).

As a rebuttal witness, Strange denied that he offered Hilligiest any money, and he denied hearing Riley offer Hilligiest any money to testify (17:3070). A rebuttal witness on other points, Riley was not asked about the matter of a money offer by himself alone or in the presence of Strange.

I credit Strange in his denial of a money offer to Hilligiest for the latter to give a (true) statement to NLRB Region 23. Hilligiest did not impress me as a reliable witness.

(2) Conclusions

The issue as to Strange is close, and there are indications both ways. SDC had to strain mightily regarding the occasion of Strange's discharge. Respondent seems to have gone out of its way to penalize Strange for failing to report a dent he could not have seen even if he had inspected his vehicle before leaving Respondent's compound the morning of Friday, 23 November. He could not see the dent, apparently a rather small one, until he removed the dolly. On that basis, in light of the overall evidence of the entire case, plus the lack of credibility of Hunt in particular, I infer that there was another—and unlawful—motive.

Finally, I find that the reason Craine did not reverse Hunt's action was that Craine considered Strange a troublemaker to be eliminated because he had fooled Respondent regarding his union sentiments.

Respondent did arrange for free assistance to Strange on his DWI charge, and that is a significant indication against a violation. The fact is, however, I do not believe Respondent's witnesses. As I find that a prima facie case was established which Respondent did not rebut, I shall order Respondent to offer Ira C. Strange reinstatement and to make him whole.

4. The discharges of Richard D. Jackson and Rodney I. Lyons for failing to make delivery stops

a. *Introduction*

Driver Richard D. Jackson was fired on 3 July 1985 by Sales Manager Hunt on the basis, Hunt testified, that he failed to deliver at some stops on 1 and 2 July (1:103–104, 138).

Hunt fired helper Rodney I. Lyons along with Jackson for missing the same stops plus, apparently, The Galleon bar on Friday, 28 June (1:114–116). Lyons had been helping on Jackson's route for less than a full week, with his first day on the route being Wednesday, 26 June 1985 (8:1477).

At the time of his discharge, Jackson, hired in 1959, had worked at SDC for 26-1/2 years (1:145; 8:1506, 1559). Chief steward from 1971 to 1978,[174] it appears that his only official union function the last year or more of his employment was to administer a disability fund which acquired its funds by payroll deduction (8:1507, 1518). Jackson would advise payroll clerk Carrie Jean Skinner when and to whom disbursements were to be made (8:1518, 1540–1541). Following certification SDC continued to handle the clerical deductions and disbursements, but SDC also assisted, to some extent, administering the fund at that time (8:1545, 1568).

In early to mid-June 1984 Jackson declined the separate requests of Kirk Nelson (8:1508–1509, 1538) and Ross Miller (8:1509–1511, 1539) that he sign the decertification petition. Jackson never signed it (8:1511; G.C. Exh. 2). Neither did he sign one of the union membership revocation letters (G.C. Exhs. 15, 16).

About mid-June President Emeritus Gray approached Jackson at the coffee bar of the salesroom and said he heard that Jackson had been criticizing SDC and owner Georges. No, Jackson replied, but he had said he was upset over the recent pay cut for the drivers. Jackson added that even as in political elections, the people support whoever is elected, and that he supports SDC and Budweiser, union or nonunion. Gray said all right and left (8:1513, 1566). Although Jackson and Gray had been friends for over 26 years, their previous conversations were not of this kind, and mainly related to family (8:1559–1560, 1567). There is no complaint allegation concerning this, and Gray did not address the subject during his testimony. I credit Jackson.

Shortly after Gray questioned Jackson, owner Georges came to Jackson in the salesroom and said he understood and appreciated Jackson's position. Jackson said he was backing Georges and Budweiser 100 percent. Georges said that was all he wanted to know, thanked Jackson, and returned to his office (8:1560–1561).

In the salesroom in the week following the election, Jackson testified, Sales Manager Clayton Hunt, followed by Supervisor Mel Cook the next day, and Supervisor Bill Spears on the third day, asked him how he had voted in the election.[175] Jackson said he voted for the Union. Hunt turned and walked away as did Cook and Spears when he told each of them the same (8:1514–1516). Hunt denies the allegation (17:2986), as do Cook (15:2668–2669), and Spears (15:2654).

I credit Jackson who testified on this more persuasively than Hunt, Cook, or Spears, and I find that, as alleged, Respondent violated Section 8(a)(1) of the Act by interrogating an employee on one of the most basic rights of the Act. Even though Jackson answered the questions, and even though his support of the Union was admittedly well known (8:1543–1544), Respondent violated the Act by asking an employee how he voted in a Board-conducted election.

In April 1985 payroll clerk Carrie Jean Skinner gave Jackson some new forms to be signed authorizing SDC to deduct $2 biweekly from the pay of each employee for payment into

[173] Hilligiest had been Riley's helper. He succeeded to the driver position on the route when Riley was fired (16:2888, 2900–2901).

[174] Jackson explained that at SDC the terms chief steward and shop steward are used interchangeably (8:1507–1508).

[175] Complaint par. 18.

the ''Southwest Distributing Company Employees Benefit Fund'' (8:1519; G.C. Exh. 60). Between 12 and 23 April 1985 Jackson, frequently in the presence of supervisors,[176] obtained signed forms from a total of 55 employees (8:1535; G.C. Exh. 60). Hearing a rumor that someone was trying to start a union, Jackson became frightened that SDC would conclude from Jackson's form-signing activity that it was Jackson who was trying to reorganize the union forces. Because of his fright, Jackson never submitted the 55 signed forms to Skinner. He even thought that Skinner may have tried to set him up by giving him the forms, for in the past he (apparently from the Union) had furnished the forms (8:1519–1520, 1544, 1547–1548).

Previously I found that in early June 1985 Supervisor Mel Cook confided to Jackson that Jackson and Bailey were next on the ''list'' to go.

Lyons worked nearly 14 years for SDC, from 16 August 1971 to his 3 July 1985 discharge (8:1393). From January to September 1984 Lyons was a driver. In September Hunt told Lyons that because certain routes were not selling enough beer he would have to choose between driving without a helper or taking a helper's job on another route. Lyons chose the latter (8:1473–1477). Lyons broke a finger on 18 December and was off work until 7 January 1985 (8:1473).

Lyons' actual classification beginning in January 1985 appears to be that of ''swing man'' (8:1475–1477). A person in the swing position substitutes as a driver or helper as needed (8:1475; 16:2859, 2882). Executive Vice President Hayes describes Lyons as a very experienced driver (16:2860).

As previously discussed, Lyons was subjected to intense pressure by Executive Vice President Hayes, plus additional pressure from Vice President Crouse, to support the decertification movement. Lyons signed the decertification petition[177] in order to keep his job (8:1402), and, at Hayes' persistence, he signed a union membership revocation letter because Hayes said he thought it would help save Lyons' job (8:1410, 1416; G.C. Exh. 15–44). Lyons testified that he did not engage in any union activities after he signed the revocation letter (8:1493).

In April 1985, Lyons testified, he went to Hayes in the latter's office and said he was being wrongly accused of trying to start a union.[178] Hayes called in Hunt and told him what Lyons had just said. Hayes added that he knew Lyons had signed a revocation, but he did not know how Lyons had voted. Hunt said he had heard this (rumor) and was going to ask Lyons where he stood on that question.[179] Lyons said he was for SDC, that he was there to work, that he had nothing to do with the Union, that he had resigned from the Union in an effort to keep his job, yet he felt he was being treated worse than some of those who had continued to support the Union (8:1411–1412, 1497–1498).

Neither Hayes nor Hunt addressed Lyons' description of this April 1985 conversation in his own testimony. In crediting Lyons, I find that Respondent violated the Act as alleged by Hunt's statement and his implied question of whether Lyons was in fact trying to assist in reorganizing the union forces. I note that Hunt's statement and implied question occurred in the context of Hayes expressing some doubt as to Lyons' loyalty notwithstanding his revocation letter—because Hayes did not know how Lyons had marked his ballot in the secrecy of the voting booth!

b. *SDC's work rules*

SDC's ''old'' rule pertaining to missed stops is found in rule 26 of the 1 July 1981 edition of Respondent's rules (U. Exh. 4):

> All assigned licensed retail accounts in each day's sales tickets will be called on by route salesmen. Failure to do [so] will be cause for discharge.

Respondent moderated the second sentence significantly in the general work rules implemented 1 June 1984, for general rule 28 provides (G.C. Exh. 18 at 30):

> All assigned licensed retail accounts in each day's sale tickets will be called on by route salesmen. No account will be skipped if possible to make the account.

The penalty provided for a first offense violation of new rule 28 is a *written warning*. Discharge is not until the second offense. Although the rules give SDC discretion to levy a *lesser* penalty, there is no provision for imposing a greater form of discipline (G.C. Exh. 18 at 37–38).

There are brief references in the record to an employee handbook SDC published in November 1984 (G.C. Exh. 11). In the last several pages of the handbook SDC copies the rules (unnumbered in the handbook) implemented 1 June, although it divides them under headings determined by the severity of the penalty. The language of rule 28 appears undisturbed at page 20 under the penalty of a written warning for first offense, discharge for second offense. Hunt testified that so far as he knows the handbook rules were in effect when he fired Jackson and Lyons on 3 July 1985 (1:125). The parties stipulated that the rules were in effect November through 31 December 1984 on the understanding that some of the rules had been changed (1:50–51, 125–126).[180] Hunt testified that a different book had been distributed at some point (1:126).[181]

In light of Hunt's testimony that the rules were in effect so far as he knew when Jackson and Lyons were fired, and because there is no showing in the record that the rules in question were changed, I find that the language of rule 28, pertaining to missed stops, was in effect on 3 July 1985.

While summarizing rules and penalties, I should note Hunt's testimony that to his knowledge Jackson had received no prior written warnings for missed stops (1:105). Hunt concedes that he is sure that every driver has overlooked a stop, the customer usually calls in to report it, and the driver is not fired (1:105–106). The parties stipulated that from August 1982 (the beginning of Craine's tenure as president) to 3 July 1985, no employee was discharged for missing stops

[176] Jackson named Sales Manager Hunt and Supervisors Ross Miller, Bill Jordan, and Mel Cook (8:1519). None denied this testimony when each of them subsequently took the witness stand. (Miller testified earlier than Jackson, and Miller was not recalled during the Respondent's case-in-chief.)

[177] The last name on the petition is that of Lyons (G.C. Exh. 2).

[178] Whatever specific statement or rumor prompted Lyons to go to Hayes is not described in the record.

[179] Complaint par. 24(a). Par. 24(b) alleges that Hunt then followed up by asking where Lyons stood concerning this matter.

[180] Respondent's counsel stated that he did not think any of the rules relevant to this proceeding had been changed (1:50).

[181] No copy of the new handbook was identified or offered in evidence.

on his route (1:151). More than that, for the same period, the parties stipulated, Respondent has no record of an employee having even been disciplined for missing stops on his route (12:2179–2181).[182]

One final note before we take up the stops Jackson and Lyons missed. Dennis Powers was the supervisor for Jackson's route. Powers admits that the helper (Lyons in the instance before us) is not normally held responsible for stops the driver misses, and that Lyons was *not* responsible for the stops Jackson missed here (15:2735).[183] Thus, Powers testified on cross-examination (15:2735):

> Q. (By Ms. Gant) So, the only thing Mr. Lyons did wrong was missing The Galleon; is that right?
> A. Right.

As we shall see, Lyons supposedly missed The Galleon, a bar, on Friday, 28 June 1985, when he substituted as driver for the route in Jackson's absence that day.

c. *The missed stops*

Jackson's route was No. 21 (12:2277; 15:2176). Wednesday, 26 June 1985, was Lyons' first day to assist Jackson as a helper (8:1477). Although Lyons had worked on route 21 before, he had not done so since 1977—8 years earlier (8:1477, 1490). On Thursday, 27 June, Jackson was injured, did not complete the route, and did not work the following day, June (8:1522). Although he was unfamiliar with the route, Lyons, at the request of Supervisor Ross Miller, pulled route 21 on Friday, 28 June, assisted by a new employee (8:1478–1479). Lyons did not work on Monday, 1 July, but Jackson did, assisted by a new employee (8:1482, 1523–1524). Lyons was back at work on Tuesday, 2 July, and assisted Jackson in delivering his route.

Supervisor Dennis Powers testified that Lyons failed to deliver to The Galleon on Friday, 28 June, even though, according to Powers, he reminded Lyons to be sure and make delivery there because it was Gay Pride Week in Houston (15:2716).[184] Lyons denied that Powers gave any such instruction (8:1480; 17:3049). I credit Lyons. Powers did not impress me as being a forthright witness.

There is little question that Lyons missed The Galleon on Friday, 28 June. Much of the evidence is concerned with whether the bar ran short of Budweiser beer as a result.[185] One question is whether Respondent received a call from The Galleon, as Powers testified (15:2716–2721, R. Exh. 57), complaining that the bar had not been serviced on 28 June and that it had been out of Budweiser the entire weekend. According to Powers he spoke with a ''Bill'' by telephone (15:2716, 2720, 2734). Barry Leach, The Galleon's assistant manager who works the day shift, testified that although no delivery was made on 28 June, The Galleon did not run out of Budweiser that weekend. Although he does not work nights, Leach testified that there was beer there in the mornings (3:545–546, 554–556). Barry Leach was not recalled by the General Counsel to testify concerning whether there is a ''Bill'' who works at The Galleon.

The real issue here, of course, is whether even if SDC did receive a call from The Galleon on Monday, 1 July at 12:17 p.m. (presumably during Barry Leach's shift there), Respondent fired Lyons for that reason, or whether it seized on the event as a pretext to rid itself of Lyons because of union-related considerations.

At the early morning sales meeting on Monday, 1 July, Sales Manager Hunt instructed the drivers, as Jackson concedes, that the 232 Stop-N-Go stores in Houston serviced by SDC would be having a sale on ABI products and that the stores should be serviced, including displays built by the driver, and helpers, because news advertisements by Stop-N-Go would appear on Wednesday, 3 July (8:1525, 1553–1554, 1557).[186] Two weeks earlier Hunt had announced a similar promotion by Stop-N-Go and he gave similar instructions then (1:103, 139; 8:1558–1559, 1566).

The week of 1 July was a 4-day week because of the holiday on 4 July (8:1483, Lyons). Supervisor Powers testified that it was a busy week for SDC (15:2732, 2739). Jackson described it as the hardest 4-day week of the year (8:1573). It means longer hours than normal in order to crowd the work of 5 days into 4 days (8:1483). Hunt testified that Jackson's normal working day would be 10–12 hours, and that there would be enough hours for him to service his accounts that week (1:144).

Powers testified that SDC can (legally, apparently) sell beer until midnight, and that drivers are expected to work until then if necessary (15:2743–2744). As observed by Jackson, however, the problem is that different stores receive beer only during certain hours, with the Stop-N-Go and Tenneco stores not taking any beer after 3 p.m., and the Safeway stores ceasing at noon (8:1565).

In the course of delivering over 1100 cases of beer on Monday, 1 July, Jackson had to go back to the warehouse and reload twice (8:1531).[187] He worked about 15 hours that day (8:1527). On that Monday Jackson missed a Safeway stop and a Tenneco store because he did not have enough beer on the truck at the time, but he delivered them the following day, 2 July (3:1530).

Tuesdays are what is termed ''bottle day,'' and Jackson (8:1528) and Powers (15:2740) agree that handling bottles involves extra work. This is because the empty bottles have to be loaded onto the truck and returned to the warehouse (8:1528; 15:2740).

On that Tuesday 2 July, Jackson and Lyons worked from 7 a.m. to 8 p.m., or 13 hours, and even though it was bottle day,[188] they still managed to deliver over 1000 cases

[182] There is some indication that Respondent did not intend the stipulation to mean that no driver was ever informally *orally* cautioned, counseled, warned, addressed, or whatever, concerning missed stops (12:2180). There is no suggestion that informal oral cautions are of concern to the General Counsel. I do not interpret the stipulation as covering any such informal oral discussions.

[183] Supervisor Mark Horner also testified that a helper is not held responsible for stops the driver misses (15:2598).

[184] Although The Galleon is a bar apparently frequented by homosexuals, Powers concedes that route 21 covers most such bars in Houston (15:2716).

[185] Lyons apparently worked diligently that 28 June, for he delivered over 1100 cases of beer—300 to 400 cases more than a typical day. He had to go back to the warehouse and reload at least twice that day (8:1481). It was a long day, with Lyons beginning at 6:50 a.m. and not finishing until nearly 15 hours later at 9:30 or 9:40 that night (8:1480).

[186] The number of 232 Stop-N-Go stores is from Hunt (1-140)

[187] Jackson normally sold (delivered) about 600 to 700 cases a day (8:1527, 1552). He was hampered in part because SDC recently had substituted a 12-bay truck for the 16-bay truck he formerly had been assigned (8:1526). The warehouse is a mile or two from Jackson's route. and it takes 30 to 45 minutes to go back for a reload (8:1554).

[188] Most of the bottles were delivered on their initial trip (8:1502–1504).

(8:1527). Jackson and Lyons had five Stop-N-Go stores to make that Tuesday. They missed three of the five (1:115; 8:1482–1483, 1526, 1558, 1566).

Powers testified that on Tuesday, 2 July, Safeway called complaining of being skipped the day before (15:2725, 2739). Powers went to find Jackson on the route to tell him to deliver the Safeway store (15:2725, 2740). On finding Jackson, Powers told him to make the Safeway ''Now.'' (8:1553; 15:2740, 2742)[189]

As the record reflects, there has been some friction between Powers and Jackson. On 5 December 1984 Powers ''cussed out'' Jackson and helper Ray Loy on the parking lot of a Kroger's store regarding work matters, and Jackson protested this to Hunt who said he would talk to Powers. A couple of days later Hunt said he had talked to Powers about it and asked Jackson to work with Powers. Hunt said Powers was a little hot-headed and offered to move Powers to supervise another route if there was any more trouble (8:1549–1551). Powers was hired as a merchandiser in February 1984 (15:2710). He substituted as an acting supervisor at times (such as during the events at hand) and did not become a regular supervisor until October 1985 (15:2710–2711, 2715, 2729–2730).

On Wednesday at 7 a.m., 3 July, Jackson and Lyons were called into Sales Manager Hunt's office where Hunt fired them. Present were Hunt, Powers, Jackson, and Lyons (8:1484, 1531; 15:2726–2727). Holding up a copy of Stop-N-Go's newspaper advertisement, Hunt asked why Jackson had missed the three Stop-N-Go stores.[190] Because, Jackson replied, he had been making call-ins from accounts out of beer,[191] that he was unable to get to the three Stop-N-Go stores because he and Lyons kept running out of beer, and that he had planned to deliver to them that very morning (8:1485, 1532–1533; 15:2727).

Hunt responded, ''Goddamn, Dick, that's not good enough. You just jeopardized 200 accounts for this company because you didn't want to go by Stop-N-Go.'' Hunt said he had told the drivers to make them on Mondays and Tuesdays and had been harping on that for a week, that Paul Daigle and Ron Mure had missed some Stop-N-Go stores the week before, and that he was going to talk to them about that.[192] Hunt asked Powers if he had reminded Jackson (to service the Stop-N-Go store) and Powers said yes. ''Well, I'm not going to put up with that kind of crap around here,'' Hunt stated (8:1528–1529; 15:2727).

Turning to Lyons Hunt asked him about The Galleon. Lyons said he had forgotten to deliver there. ''Well,'' responded Hunt, ''You've been around here long enough, Rodney, to know better. You've been dogging it around here long enough. So, as far as I'm concerned both of y'all are no longer employed here.'' (15:2728)[193]

Jackson asked Hunt to give them another chance. Hunt said no, that he had wanted the stops made by Tuesday.[194] He told them to turn in their keys, and said that their checks would be ready Friday. Again Jackson asked for another chance, but again Hunt said no (8:1485, 1533).

Jackson reminded Hunt that he had taken no action against Powers when he cussed out Jackson and helper Ray Loy on the parking lot at Kroger's. ''No, but I talked to him,'' Hunt replied. Jackson said that ever since then Powers has not assisted in building displays or anything else.[195] Hunt asserted that Jackson has been after Dennis ever since he has been (an acting supervisor). ''No, you're wrong. I'm the one that recommended him for the job to Bobby Hayes.[196] Jackson asked Hunt to give them another chance, but Hunt said no. The interview ended (8:1533–1534).

Hunt testified that so far as he knew Jackson had not started slacking off over the years (1:145). President Craine testified that he reviewed the discharges of Jackson and Lyons and that, in fact, one of the Stop-N-Go managers (whose name, Craine could not recall) had called him reporting his store had been missed (2:211). Craine, it appears, approved the discharges of Jackson and Lyons.

d. *Discussion and conclusions*

Respondent contends there is no prima facie case regarding either Jackson or Lyons. I find that there is.

Barely a month before Respondent fired Jackson and Lyons a supervisor confided to Jackson that Jackson and Bailey were next on the ''list'' to be terminated. As both were very long-term employees (they were hired in 1959) who did good work,[197] it is clear that they were so named for reasons other than their work performance. Respondent contends that this evidence self-destructs because Bailey was not fired (Br. at 207). But a sophisticated employer may bide its time, and there is no requirement that an employer fire all union supporters before the discharge of one may be found unlawful.

Pointing to the fact that Jackson, on 26 July 1985, filed a charge with the Equal Employment Opportunity Commission alleging that Respondent fired him because of his age,

[189] Powers testified that the following day Jackson told him the order sending him to Safeway caused him to have to reload (15:2741). This apparently was because when Powers arrived at about 1 p.m. Jackson and Lyons were still handling bottles (8:1552, 1556).

[190] Hunt testified that Jackson's skipping the three Stop-N-Go stores was the reason Hunt fired him (1:145).

[191] Jackson testified that he was still delivering beer to accounts undelivered last Thursday when he was injured and unable to complete his route (8:1530). And, Jackson testified, under long-established policy at SDC, call-ins (accounts reporting out of beer) were to be serviced first (8:1524).

[192] Paul Daigle is identified elsewhere as a driver on route 15 in 1984 (12:2228, 2276; U. Exh. 29). I assume that Mure was a helper. Daigle had been on union dues checkoff since March 1972 and Mure since January 1981 (R. Exh. 64). Both signed the decertification petition at, respectively, places 47 and 16 (G.C. Exh. 2), and both signed union membership revocation letters (G.C. Exhs. 15 and 16). Neither Powers, who subsequently testified, nor Hunt, who testified on the last day, addressed the reference to Daigle and Mure.

[193] The line about ''dogging it'' was not delivered with the ring of truth. Moreover, it seems to be an afterthought forced into the remark in an unnatural fit. Lyons testified that he said nothing at the interview (18:1485). Had he been accused of ''dogging it'' he may well have responded. In any event, I find that Hunt did not say it.

[194] Lyons was not at work at the 1 July sales meeting, and he testified that Jackson never told him that Hunt wanted the Stop-N-Go stores serviced by Tuesday evening (8:1486).

[195] As the record reflects at several points, supervisors help drivers build displays or even build them unassisted by the drivers. Supervisors Ross Miller (5:890) and Chris Garcia (14:2351), for example, testified to this effect.

[196] Jackson testified that Powers began as a stocker filling cold boxes on weekends, and later became full time. Thereafter, Jackson recommended that Hayes hire him as a salesman (8:1548). Jackson testified that he has never had trouble with any other supervisor (8:1551).

[197] Bailey is an outstanding employee who, in the recent past, had received top honors for a sales route. Hunt knew of no written warning Jackson had received, and testified that, to his knowledge, Jackson had not slacked off in his work over the years (1:105, 145). While that is not expressly the equivalent of saying Jackson performs well, I find that his work performance—with over 26 years of service—in the recent past has been at least acceptable. There is no record evidence to the contrary.

52, in violation of the law (8:1561–1563; R Exh. 25),[198] Respondent argues that the basis for the EEOC and NLRB charges are ''mutually exclusive.'' (Br. at 206 fn. 157.) Because an employer may have more than one motivation, including more than one unlawful reason, for discharging an employee, the EEOC and NLRB charges are not mutually exclusive or mutually contradictory. *Midwest Motel Management Corp.*, 261 NLRB 719, 726 (1982).

However, the strongest factors indicating that Respondent was unlawfully motivated are these. First, Respondent ignored the written rules it implemented on 1 June 1984 and republished a few months later in November. Those rules clearly call for a written warning for a first offense such as we have here. Moreover, the significance of Respondent's disregard of its written rules is magnified by the fact that at least during Craine's tenure (August 1982) Respondent had no record of even one driver ever having been disciplined, much less fired, for missing stops. No doubt the reason is because, as the record shows, missing stops is not at all uncommon. Thus, the disparity of application is total.

The issue is not whether SDC is bound by its own written rules, for it is not. But the disregard of those written rules, particularly in the circumstances here, is a strong indication of an unlawful motive.

The facts of our case show that Jackson was not deliberately defying orders to service the stores he missed. The strongest criticism which can be applied against him is that he perhaps made some judgmental errors when choosing between different options he had on his route. However, even if I were to find (which I would not) that Jackson's failure amounted to insubordination, that too, under Respondent's written rules,[199] would call for a written warning only for a first offense.

Second, Respondent departed from its past practice in order to get rid of Jackson and Lyons. Hunt told Jackson and Lyons during the discharge conference that Paul Daigle and Ron Mure had missed Stop-N-Go stores the previous week—yet he was only going to ''talk'' to them. Moreover, former Vice President Crouse described an incident in May 1985 when one or more of Hunt's drivers missed about seven Tenneco stores during a similar promotion. Hunt told Crouse (then working in Conroe north of Houston) by telephone that he did not know why the stops were missed (2:264–265). As we know from the stipulations, no discipline issued to the drivers.

Third, Respondent ignored owner Bill Georges' own guarantee of fairness in dealing with the employees. Thus, in his speech to employees on 27 July 1984, just 3 days before the RD election, Georges told the employees (G.C. Exh. 34 at 6):

> *I will guarantee fairness and [I] base that upon my past record and performance*. [Emphasis in original.]

And elsewhere (at 8) in the speech Georges told SDC's employees:

> I hope to be afforded the opportunity to deal with each of you on a personal basis with respect to your jobs and your benefits and not through the union which does not sweat and toil and worry alongside us to keep this business thriving. If you give me that opportunity as stated in yesterday's letter: ''I'd be a fool if I didn't make sure everything was run *fairly* here in order to keep your vote of confidence and keep the union out.'' *That's only good business.* [Emphasis added.]

By ignoring its written rules, and departing from its past practice, in order to discharge an employee with no written warnings, Respondent certainly disregarded its own ''good business'' standard of dealing ''fairly'' with its employees.

Fourth, Respondent violated owner Georges' ''good business'' standard in discharging Jackson without first giving him the second chance he requested. The issue is not whether the Act imposes a standard of ''fairness'' or ''good business,'' for it does not. But when an employer discharges an employee who has served him loyally and competently for over 26 years,[200] particularly where that employee has had no prior written warnings, and in the face of his practically begging for a second chance, I can, and do, find that a different motive from the one stated was the real reason for the discharge. Further, I infer that the true motive was the unlawful one of eliminating Jackson from the payroll because of his union sentiments.

As owner Georges expressed in his speech of 27 July 1984, he wanted to operate SDC without a union. The time of July 1985 was ripe for another union election campaign. Whether Respondent desired to continue its purge of leading union adherents in order to prevent a new election, or to punish him for his failure to support the decertification, is not controlling. The fact, as I find, is that Respondent was motivated to fire Jackson because of his union sentiments and activities. I further find that Respondent failed to show that it would have disciplined Jackson in the absence of his union activities.

I therefore find, as alleged, that Respondent violated Section 8(a)(3) of the Act by discharging Richard D. Jackson, and I shall order it to offer him reinstatement and to make him whole.

The situation involving Rodney I. Lyons is rather different from that of Jackson respecting union activities. Lyons did his best to disengage from the Union in order to keep his job. Even so, Respondent had doubts regarding his sentiments, for when Hunt, in the presence of Hayes, interrogated Lyons in April 1985, Hayes observed that he did not know how Lyons had voted in the decertification election.

As the helper is not responsible for the stops on the route, we know that the only missed stop Lyons was responsible for was The Galleon. Most of the grounds discussed regarding Jackson apply here, including Respondent's disregarding its written rules[201] and its departure from past practice.

Moreover, it violated its own ''good business ''standard of dealing ''fairly'' by zapping Lyons for missing a single stop on a day when Lyons was substituting as a driver. Lyons had

[198] Jackson testified that Lyons also filed a charge with the EEOC. Whether the ground was age, race, or both, Jackson did not specify (8:1561). Lyons, who is black, appeared to me to be about 55 years of age. Jackson is white.

[199] General rules 11 and 13 (G.C. Exh. 18 at 27), also reproduced in Respondent's November 1984 rules (G.C. Exh. 11 at 20).

[200] The competence I have addressed. Based on the conversation Jackson had with Georges in June 1984, and in the absence of evidence to the contrary, I infer that Jackson has always served SDC loyally.

[201] In view of the stipulations, it is clear that Lyons had no prior written warning for missing a stop.

only recently, 26 June, returned to the route after an absence of 8 years. Even though he was an experienced employee, Lyons could make an isolated mistake. In light of the over 1100 cases of beer Lyons delivered that Friday, during the course of working nearly 15 hours, a single missed stop, by a person unfamiliar with the route (8:1502), would be classified as an isolated mistake by any employer not bent on unlawful mischief.

Once again, although the Act does not impose a standard of reasonable dealing, an action unreasonable in the circumstances can give rise to the inference that the real reason is an unlawful one.

I also note that Hunt, when called the first day of the hearing as an adverse witness by the General Counsel, sought to tar Lyons with the same brush he used on Jackson. That is, he said Lyons was fired for missing the same five Stop-N-Go stores, plus the Safeway and Tenneco, that Jackson had missed, as well as The Galleon (1:114–116).

But we know from Supervisors Powers and Horner that helpers are not normally held responsible for stops the driver misses, that Lyons was *not* responsible for the stops Jackson missed, and that the only error Lyons made was missing The Galleon (15:2735).

Indeed, so gross was Hunt's overreaching in his effort to get rid of Lyons that he overlooked the fact that Lyons was out sick on Monday, 1 July, when Jackson missed the Safeway store and the Tenneco store. The conclusion I draw about Hunt's motivations in this entire proceeding is that he would go to any length to please owner Georges and President Craine by discharging union supporters.

It is true that former Vice President Crouse was highly critical of Lyons' 1984 work performance. Nevertheless, there is no showing that in 1985 Lyons' work performance was below par. Indeed, in the only record description of his actual work productivity, that of 28 June 1985 (plus his help on 2 July), Lyons is shown to be an extremely productive worker.

Still, there is, a question as to whether Respondent fired Lyons for lingering doubts as to the sincerity of his apostasy from the Union. The solution of the riddle must be this. If Respondent had discharged only union supporter Jackson, yet retained Lyons who had signed documents supporting the decertification movement, the Union could file a charge for Jackson and argue that SDC had fired the union supporter but retained the antiunion employee.

As we know from all the record evidence, such reasoning has certain flaws when viewed with the perfect vision of hindsight. As of July 1985 the foregoing thought process was, I find, the reasoning which persuaded Respondent to fire Lyons along with Jackson. In addition, I find, Respondent fired Lyons because of the lingering doubts it had concerning the sincerity of his effort to be nonunion. I further find that Respondent failed to show that absent these considerations SDC would have fired Lyons.

In light of these conclusions, I find that, as alleged, Respondent violated Section 8(a)(3) of the Act by discharging Rodney I. Lyons on 3 July 1985, and I shall order Respondent to offer him reinstatement and to make him whole.

CONCLUSIONS OF LAW

1. SDC is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local Union 1111 is a labor organization within the meaning of Section 2 (5) of the Act.

3. Respondent SDC violated Section 8(a)(1) of the Act by the conduct of:

(a) Supervisor John Roschal impliedly threatening employee Sammy L. Tharp with unspecified reprisals if he failed to abandon the Union;

(b) Executive Vice President Bobby Hayes soliciting employee Rodney I. Lyons to sign a decertification petition and a union membership resignation letter and promising him unspecified employment benefits if he signed the latter;

(c) Vice President Crouse interrogating employee Rodney I. Lyons concerning his failure to abandon his union membership;

(d) Supervisor Bob Gay promising employee Kirby L. Johle an improved route if the Union lost the decertification election;

(e) Supervisor Mel Cook, Supervisor Bill Spears, and Sales Manager Clayton Hunt interrogating employee Richard D. Jackson as to how he had voted in the decertification election conducted 30 July 1984;

(f) President James E. Craine impliedly threatening employee Howard Lofton with unspecified reprisals for causing ''trouble'' by discussing with employees the possibility of the Union's winning a second election:

(g) Executive Vice President Bobby Hayes telling employee Fred Holliday and other employees (1) that they had been called in because SDC had learned secret meetings were being held, and interrogating them about such meetings, (2) that Fred Holliday was the ringleader of continued employee support for discharged employee Louis L. Riley, and (3) that owner Georges had said Fred Holliday was preaching in the wrong place and that the assembled employees should seek employment elsewhere because there was no more union and SDC had no need for shop stewards;

(h) President Emeritus Jack Gray telling employee Fred Holliday that (1) owner Georges was very upset about Holliday's leadership among the black employees, and (2) if Holliday so strongly favored the Union and being its spokesperson then he should seek employment elsewhere;

(i) Sales Manager Clayton Hunt interrogating employee Rodney I. Lyons about his union activities and union sentiments; and

(j) Supervisor Mel Cook impliedly threatening employee Richard D. Jackson with discharge because of his union activities by telling Jackson that he and employee James Bailey were next on the list to be discharged.

4. Respondent SDC did not violate Section 8(a)(1) of the Act by:

(a) President James E. Craine's allegedly soliciting Ross Miller to file a petition to decertify the Union;

(b) Ross Miller's circulating and filing the petition;

(c) SDC's promotion of Ross Miller to supervisor on 1 September 1984;

(d) Craine's allegedly initiating and encouraging employees to sign dues-checkoff (or union membership) revocations;

(e) Vice Presidents Bobby Hayes' and Daniel Crouse's allegedly providing additional help to Ross Miller so he would have time to solicit signatures for the decertification petition while on working time and in working areas of the plant;

(f) Supervisor Mark Horner's allegedly informing employee Sammy Tharp (1) that the reason for his discharge

was his successful grievance/arbitration resulting in his reinstatement, or (2) that Supervisor John Roschal had asked Tharp to sign a statement on company policies as a ''setup'' for his current discharge.

5. Respondent SDC violated Section 8(a)(3) and (1) of the Act by discharging these employees:

Name	*1984*
Raymond L. Rice	29 August
Howard Lofton	30 August
Sammy L. Tharp	30 August
Walter John Kimbrough	11 September
John A. Holliday	28 October
Ira C. Strange	28 November
	1985
Rodney I. Lyons	3 July
Richard D. Jackson	3 July

6. Respondent SDC did not violate Section 8(a)(3) of the Act by discharging Fred Holliday on 10 September 1984 or Edward Hartman on 21 November 1984.

7. The unfair labor practices found affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent must offer the discriminatees named in Conclusions of Law 5 immediate and full reinstatement to their former jobs, or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed. Respondent must also make them whole, with interest, for any loss of earnings and other benefits they may have suffered as a result of Respondent's unlawfully discharging them on the dates shown above in Conclusions of Law 5. Backpay shall be computed in the manner established in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest calculated as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis P1umbing Co.*, 138 NLRB 716 (1962).

Moreover, Respondent must expunge from its files any reference to its unlawful discharges of the eight employees named above. It must notify each in writing that this has been done and that evidence of the discharge will not be used as a basis for further personnel action against him.

The findings I make in dismissing certain allegations of the complaint moot the General Counsel's requests that I (1) set aside the election results and dismiss the petition in Case 23–RD–542 (Br. at 72(a)–(b)), (2) order SDC to abide by the negotiated collective-bargaining agreement and recognize and bargain with the Union, and (3) order SDC to reimburse the Union for all dues it failed to submit following the dues-checkoff revocations (Br. at 150).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[202]

ORDER

Respondent, Southwest Distributing Company, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Impliedly threatening employees with unspecified reprisals if (1) they fail to abandon their support of a union, (2) if they cause ''trouble'' by discussing with other employees the possibility of having another union election, or (3) if they do not stop their concerted discussion of job-related matters protected by the Act.

(b) Impliedly threatening employees with discharge because of their activities in support of a union.

(c) Promising employees improved job opportunities if they sign a letter resigning their union membership or if they support efforts to defeat a union.

(d) Interrogating employees concerning (1) their union sentiments and activities, (2) their concerted activities regarding protected matters, and (3) the nature of their votes in a Board conducted election.

(e) Discharging its employees because of their union membership or support and/or because of their other concerted protected activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer the employees named below immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

John A. Holliday	Rodney I. Lyons
Richard D. Jackson	Raymond L. Rice
Walter John Kimbrough	Ira C. Strange
Howard Lofton	Sammy L. Tharp

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Houston, Texas facility copies of the attached notice marked ''Appendix.''[203] Copies of the notice, on forms provided by the Regional Director for Region 23, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are custom-

[202] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[203] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

arily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply. For the purpose of determining or securing compliance with this Order, the Board or any of its authorized representatives may obtain discovery from Respondent, its officers, agents, successors, or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States court of appeals enforcing this Order and may be had on any matter reasonably related to compliance with this Order, as enforced by the court.

IT IS FURTHER ORDERED that complaint paragraphs 10(a) through (d), 12(a) and (b), and 23(a) and (b), are dismissed, and that paragraph 26 is dismissed as to Fred Holliday and Edward Hartman.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT impliedly threaten you with unspecified reprisals if (1) you fail to abandon your support of a union, (2) if you cause ''trouble'' by discussing with other employees the possibility of having another union election, or (3) if you do not stop your concerted discussion of job related matters protected by the Act.

WE WILL NOT impliedly threaten you with discharge because of your activities in support of a union.

WE WILL NOT promise you improved job opportunities if you sign a letter resigning your union membership or if you support efforts to defeat a union.

WE WILL NOT interrogate you concerning (1) your union sentiments and activities, (2) your concerted activities regarding job-related matters protected by the Act, or (3 the nature of your votes in any election conducted by the National Labor Relations Board.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Teamsters Local 1111 or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer the employees named below immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest:

John A. Holliday	Rodney I. Lyons
Richard D. Jackson	Raymond L. Rice
Walter John Kimbrough	Ira C. Strange
Howard Lofton	Sammy L. Tharp

WE WILL notify each of them in writing that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

SOUTHWEST DISTRIBUTING COMPANY, INC.